



Issue date: 29Nov2001

Case No. 2001-STA-6

In the matter of:
PATRICK CLEMENT
Complainant

v.

MILWAUKEE TRANSPORT SERVICES, INC. (MTS)
Respondent

BEFORE: THOMAS F. PHALEN, JR.
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This proceeding arises under the employee protection provision of the Surface Transportation Assistance Act of 1982, 49 U.S.C. §§ 31105 (the Act), and the regulations promulgated thereunder, 29 C.F.R. Part 1978. The hearing was held before the undersigned on February 13 and 14, 2001 and March 13, 2001.

Complainant, Patrick N. Clement, ("Mr. Clement" or "Complainant" herein) filed a timely complaint with the Secretary of Labor ("Secretary" herein,) on August 4, 1999, alleging that Milwaukee Transport Services, Inc. ("Milwaukee Transport Services," "MTS" or "Respondent, herein, discriminated against him in violation of the whistleblower provisions of the Act. The Secretary, acting through her duly authorized agents in the Occupational Safety and Health Administration, ("OSHA" herein) investigated the complaint and determined that there was no reasonable cause to believe the respondent had violated the whistleblower provisions.¹

¹References to ALJX, JX, CX, and RX refer to exhibits of the administrative law judge, joint exhibits, and those of complainant, and respondent, respectively. The transcript of the hearing is cited as "T", followed by the page number.

Mr. Clement contested the Secretary's decision under cover of a letter dated November 1, 2000, and appealed her determination.. He waived the procedural time constraints under the Act on November 30, 1999. Pursuant to appropriate notices (ALJXs 1-3), I conducted a formal hearing in Milwaukee, Wisconsin , on February 13 and 14, 2001, and took additional evidence on the matter on March 13, 2000, at which time the parties were given the opportunity to present both testimony and documentary evidence. The record remained open until July 30, 2001, when the simultaneous reply briefs of the parties were filed.

The findings of fact and conclusions of law which follow are based upon the testimony and documentary evidence presented and arguments of counsel. The following exhibits were received into evidence at the hearing: ALJX 1-3; JX 1; CX 1-10, 12 - 31 and 33-47 and 49A & B, (there is no CX 48), and RX A - Y. CX 11, 32, and 50-56 were rejected.

Continuation of Hearing on March 13, 2001.²

At the close of the original hearing, on February 14, 2001, the parties agreed to take the deposition of Union representative, Ric Bassler. Subsequently, the parties contacted the undersigned and requested that I preside over the taking of the deposition, at which time I agreed, instead, to a reopening of the record via telephone conference, for the taking of Mr. Bassler's testimony on March 13, 2001. Pursuant to that agreement, Mr. Bassler's testimony was taken and certain exhibits, Claimant's Exhibits 50-56 were marked for identification, considered by the undersigned and rejected in that they had not been timely submitted. There is an index for the exhibits and the exhibits were received via facsimile on the date of the hearing. (T 451-452) Mr. Clement maintained that they were received from Union Attorney Quindel at the time of the hearing, and they were being produced in accordance with a subpoena to Mr. Bassler, in too short of time for him to review them and put them into evidence. I basically ruled that they were not admissible because they could have been reviewed in the time period between the close of the hearing and the opening of the present hearing, and that the day of the reopened hearing was too late. Mr. Clement clarified that two of them, CX 55 and CX 56, were received the previous week, and consistent with the newspaper article on March 1 (CX 56) which was provided to them and copies made at the hearing. He stated that 50-55 were all included in the documents, including 55 which he got February 13th. Respondent's attorneys had not received any additional documents from Mr. Clement that he had received from the union to be utilized as exhibits since that day. (T 454)

²To the extent that any particular item of post hearing correspondence from the parties is deemed to constitute a motion to find that another party has engaged in unlawful or inappropriate conduct in this proceeding, the said allegations have all been considered and are denied. Respondent's motion to strike portions of Complainant's reply brief is also denied.

Respondent's counsel stated that copies were given to them at the time in a statement that he made in preparing a list of index of his exhibits, but they did not include any of the new ones that have been given to him. Exhibit 56 was denied outright as a immaterial newspaper article about a bus operator who passed away on March 1, 2001. Claimant's Exhibits 50-56 were not admitted based on timeliness.

ISSUE

Whether Milwaukee Transport Services, Inc. discharged Patrick N. Clement as a result of safety complaints protected by the Surface Transportation Assistance Act.

FINDINGS OF FACT

Stipulations:

The parties stipulate, (JX 1) and I so find:

1. The Office of Administrative Law Judges, U.S. Department of Labor has jurisdiction over the parties and the subject matter of this case.
2. Complainant is now, and at all times material herein, a "person" as defined in Section 311.01(3) of 49 U.S.C.
3. Patrick Clement was an employee of Milwaukee Transport Services, Inc. during the applicable period in that he was employed as a bus operator.
4. Pursuant to Section 311.05(b) (1) of the S.T.A., Mr. Clement filed a Complaint on August 4th, 1999 with the Secretary of Laor alleging that Milwaukee Transport Services discriminated against him in violation of Section 311.05 of the Surface Transportation Assistance Act, 49 U.S.C. 311.05.
5. The original Complaint filed with the Secretary was timely.
6. Following an investigation, the Regional Administrator, Occupational, Safety and Health Administration, issued his findings on the Complaint on September 29, 2000.
7. Complainant received those findings by mail on October 1, 2000.
8. Complainant mailed an appeal and request for hearing to the Chief Administrative Law Judge, U.S. Department of Labor, Washington, D.C. on November 1, 2000.

9. The appeal of the Complainant satisfied the 30-day time constraints provided by 29 C.F.R. Section 1978.105.

10. Mr. Clement was hired by MTS as a bus operator on February 10, 1992.

11. Mr. Clement arrived at the station on February 4, 1999 at 1:27 p.m. to start his afternoon route and was informed by the station Clerk Chuck Ciardo that he was to see Mr McGinty, the Division Manager.

12. Mr. Clement was terminated on February 4, 1999.

Testimony and Documentary Evidence:

Patrick Clement:

Background: Four-way Flashers:

Mr. Clement testified that before he started working for MTS, he worked as a professional truck driver and was “very aware” of the regulations under the Federal Motor Carrier Safety Regulations (FMCSR) as a “commercial driver’s licensed” (CDL) driver. (T 107) He also testified that he had worked as a CDL instructor for Pro-Drive, a truck driving training school in Sturdevant, Wisconsin teaching trainees the requirements of the law and the logging work that was necessary to maintain proper weights for exits. (T 107)

Eventually, he saw an ad in the paper for an operator position at MCTS (Milwaukee County Transit System) and filled out an application which resulted in a call to take tests at the Administration Building on North Seventeenth Street, Milwaukee.

Mr. Clement was hired as an entry level driver and would be required to take two weeks of bus driver training, which would permit a “P” (passenger bus) endorsement on his CDL license. (T 108) (His CDL was for any other type of vehicle other than a school bus.) (T 108)

During the two weeks of training, he testified that he was always told that he worked for MCTS, not MTS. (T 108) John Goldsteinn, President of ATU (Alamagated Transit Union) Local 998 spoke. His union represents the drivers and mechanics as the bargaining agent for MTS. (T 109) This included everybody at MCTS except for the clerical people. (T 109) After he worked there, when looking at his pay stub, he realized that it said that he was receiving his check from Milwaukee Transport Services, Incorporated. Mr. Clement stated that there was a legal difference between the two and that the Milwaukee Transport System was a public institution and Milwaukee Transport Services, Inc. is a private corporation. (T 111) Mr. Clement claimed that the affect of the difference as stated by Mr. Goldstein was that by working for MTS they were exempt from state law and didn’t

have to follow that law because they were a municipality as part of the Milwaukee County government. (T 111) When asked what that meant in terms of issues that were being raised in this matter, he stated that it had an affect on the issue that will be discussed regarding four-way flashers. Whenever he would ask about motor vehicle laws, and he would ask supervisors at MTS, he was told they were exempt from those laws and that they do not apply to them because they were a municipality. He was also told that the pay check didn't mean anything, that they worked for Milwaukee County Transit System with reference to Section 392.22 of the FMCRS, and they were exempt.³ (T 112) **[Mr. Clement did not give any specific information on who made that claim.]**

Upon discussing the relationship of MCTS and MTS with Mr. Goldstein, he found out from Mr. Goldstein that there was a contract between MCTS and MTS, for MTS to operate the county owned bus system. (T 116) Mr. Clement took the position that they were a private corporation, they were no different than Roadway Express, or any other carrier, they were essentially the same as Wisconsin Coach, Badger Coach, or other companies as a common carrier. Mr. Goldstein told him that he should look into it. Mr. Clement did find out that there were laws that govern the operation of private carriers in Wisconsin. (T 116) He discovered that the Federal Motor Carrier Safety Regulations (FMCSR) were adopted by the state of Wisconsin, that they were subject to the laws and not exempt, and that they were supposed to be following them. (T 116)⁴

In order to discuss this issue, Mr. Clement related an earlier issue concerning voluntary overtime which he felt was dangerous because they did not get enough time off and there was no statutory eight hour rest. He asked about this and was told that he was given incorrect information by Mr. Goldstein about it and they could not file a grievance on it. (T 113-114)⁵

³I find that due to stipulation 1. on jurisdiction over the subject matter of this case, other issues about the relationship of MCTS or MTS to the employment of Mr. Clement, on to the use of the four way flashers do not affect the outcome of this case.

⁴In a question to Ms. Ninneman about legal determinations on the MCTS/MTS matter, she stated that the Wisconsin Supreme Court had determined that the transit system, MCTS, was owned and operated by Milwaukee County municipality, and that they contract with MTS, to provide management and employee services, so that Mr. Clement would be an employee of MTS, a private company, acting as agent for the municipality. The Court ruled that in such a circumstance, the agent was in the situation that a municipality in relation to the employee. (T 118) She stated that it was their position that for a municipality the federal provision did not apply, because they were not in interstate commerce as a municipality, but that the state of Wisconsin had adopted rules including the exemptions. In the exemptions, there is a specific one for the four-way flasher rule that exempts school buses and bus companies like MTCS, and it would be discussed in the brief. (T 119) Respondent's brief did not provide the applicable citations. I draw no conclusion from this statement.

⁵ In response to a company objection to this testimony, I admitted it on the basis that Mr. Goldstein was representing a position of the organization to Mr. Clement, and that this was an exception to the hearsay rule. I also stated that if the Employer challenges this position, it had a right to cross-examination on it, and to present evidence that it wasn't a position of either the organization or the Employer. (T 114) Respondent's attorney, Ms. Ninneman, stated that the Employer had alternate positions with regard to the four-way flashers, stating first that the provision

Mr. Clement testified that each time he brought up this adoption of the rules, he was told by company officials that they were a municipality and they weren't listening to what he was finding. He even brought this to them in writing. This, he said, resulted in eventually accumulating discipline and suspensions, and three OSHA settlement agreements returning him to work. (T 117)⁶

A discussion in the matter revealed that the Respondent's position is that the flasher rule does not apply to it. Under the rules, if a vehicle, a truck has to pull over, not on an ordinary traffic stop, but has to pull over immediately and put on the flashers, within ten minutes the driver has to get the orange triangles and cones out, to tell people it is out of traffic, and that this could not apply to a county bus stopping to pick up passengers or on a layover spot. (T 120) I then quoted Section 392.22 which states:

(a) Whenever a commercial motor vehicle is stopped upon the traveled portion of a highway or the shoulder of a highway [f]or any cause other than necessary traffic stops, the driver of the stopped vehicle shall immediately activate the vehicular warning signal flashers and continue the flashing until the driver places the warning devices required by the next section. . . .

I stated that I was not interested in the rest of the details, that the issue was not clear and involved an interpretation of the provision; that I could see as reasonable a strict interpretation such as that being suggested by Mr. Clement, and that I could see as reasonable an interpretation adopted by the company that, in their opinion, it applies to certain kinds of stops. (T 120-121) At this point, I ruled that the rule applies but that there was a difference of opinion on how it should be applied or be interpreted, and that I would not decide that matter. Respondent's counsel took strong issue with a ruling that the provision applies to MCTS, stating that she did not know of any transit company in the country to which it applied. (T 121)

At this point, Mr. Clement wanted to know who the lawyers of the Respondent represented, MCTS or MTS, as two separate entities, and Ms. Ninneman stated that they represented MTS, Mr. Clement's employer, and the entity that has been challenged. (T 122) When asked whether there were anyone there on behalf of MCTS, Ms. Ninneman stated that MTS acts on behalf of MCTS. (T 122) After more discussion, I pointed out to Mr. Clement that ultimately regardless of the interpretation, what happens in light of *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 506-508 (1993), and other cases, is whether or not the employer has a legitimate business explanation for the action taken against Mr. Clement. He stated that the employer may have the right to take its interpretation and to

of the FMCRS does not apply, they also are taking a position that if it did apply, their interpretations appropriate under the provisions in terms of its limitations on its use. (T 115)

⁶I find that the prior OSHA settlements encompassed protected activity for purposes of the present matter, but that they otherwise do not affect the present decision and order.

mandate it until there would be a ruling in the area of its legitimate discretion. I pointed out to Mr. Clement that because some authority some place may rule some day that his is the correct interpretation would not mean that he would win this case. (T 125) Mr. Clement argued with me about understanding private employer/public employer relationship between MCTS and MTS, they went back to something like 1968, and that the drivers and members were represented by ATU Local 998 since before that time. (T 127) Ms. Ninneman noted that Mr. Clement worked for MTS since 1992, and would not know this information, the details of this information, and I agreed. I honored her objection to this line of inquiry. (T 128) When asked whether Mr. Goldstein does recognize a position that has been taken by the company on the four-way flashers on behalf of the union, Mr. Clement stated that he had never asked him that directly. (T 128)

Mr. Clement testified that it is Wisconsin Chapter 327 that adopts the federal standards in its entirety. (T 129)⁷ There was a discussion on the adoption of the federal standards and the difference in policy which continued for several pages (T 130-133), involving at least seven incidents with route supervisors concerning his use of flashers when driving. (T 130-138) He filed grievances on at least three of these (T 138), and he was told that until the company could come up with a different set of proof and documentation that the rules don't apply to them, he wasn't obligated to do this, that is apply the rules as stated by the company. (T 139) He testified that he was told by a number of management officials that he would not receive any more discipline as a result obeying or following the FMCSR's during 1997 by Lloyd Perkins, the president of Local 998 and also by Mike Mullihan. Mr. Clement testified with regard to Mr. Mullihan: "he had stated that there as an agreement that I wasn't going to be cited for any further discipline." (T 140)

Mr. Clement testified that he was never informed that he was now subject to discipline and, recently, started getting discipline every time he had raised the issue. Mr. Clement admitted that he has been unable to find any documentation verifying the agreement, only references to the agreement. (T 141)

The November 20, 1998 Incident:

In November, 1998, either a day or two days after he had been "carded for having . . . [his] . . . flashers on at the layover," at North Richards and Capitol, he had been sitting there listening to some passengers when he noticed it was time to leave; started up the bus with the interior lights on at "half brilliance." The lights brightened to full brilliance as the bus started, where it was hard to see out in an area that was poorly lit. He checked the bus, looked for traffic behind him, put his turn signal on, turned the four-ways off, started towards the intersection and heard a loud bang on the glass next to him. (T 141-142) He stated that he thought someone had thrown a rock, since it was a bad

⁷Chapter 327 was replaced by Chapters 14 and 15 in the Wisconsin revised code, but without this reference. It was not addressed in his brief, and does not affect the result of this decision and order.

neighborhood in Milwaukee, and looked out. At that point he could see a shiny badge and a little bit of shirt collar, and opened the window thinking it was a police officer. It was Andy Bowers, the supervisor. (T 142) He testified that he didn't recognize him right away and later learned who he was. Mr. Bowers started talking to him and thought that he said "I'm going to take you off the bus." Mr. Clement set the brake, turned off the bus and asked him what he was doing. Mr. Clement said "you said you were taking me off the bus." Mr. Bowers responded "No, I said I would take you off the bus," to which Mr. Clement responded "Oh." Mr. Bowers asked him why he had driven away and Mr. Clement responded "It's – it's time for me to leave. My layover is over." Mr. Bowers responded "Well, you saw me standing there and you drove away from me." (T 142) Mr. Clement testified that he never saw him standing there apparently due to the above described circumstances with the lights. (T 143)

Mr. Clement went on to testify that Mr. Bowers stepped away from the bus and, since it was cold out, he closed the window. He testified that he did not slam the window in his face. Mr. Bowers then came to the door and told him that he was calling for another driver to relieve him and taking him back to the station. (T 144) Mr. Clement waited until the mechanic showed up to take the bus back and eventually he got to the station, riding with a different supervisor who was dispatched at the scene. At this point, Mr. Clement went in, saw what his work was for the next day, wrote that down and went home. He came in the next day and learned that he was suspended. (T 144)

On cross examination Mr. Clement confirmed that on November 20, 1998, he was cited by route supervisor Andy Bowers for insubordination. (He confirmed the action but not the date.) He did confirm that on November 23, 1998, Mike Mullihan gave him a three day suspension for insubordination. (T 213) (RX D) He confirmed that the grievance says that the incident that resulting in receiving Exhibit D occurred on November 20, and on that occasion he was parked at a layover and not parked in the area designated for a layover, but in the bus stop. He also stated in the grievance that he saw an individual approaching the bus from the front walking toward the bus. (T 214-215) However, in his testimony, he denied seeing him approaching the bus and stated the only time he saw Mr. Bowers was when he banged on the door at a layover. (T 215) As to whether he saw him when he pulled into the layover, he said, "Well, I didn't – I saw a silhouette. I didn't know who it was. (T 215) He stated he "saw someone behind the bus and it looked like they were crossing the street." (T 215) He didn't see someone ten feet in front, standing in front of the bus, before he had pulled up to the stop. (T 215-216)

With regard to the person behind him, 30 to 40 feet behind him, he thought they were walking and didn't notice they were running toward the bus. He confirmed that Mr. Bowers must have approached the bus and, according to Mr. Clement, hit the window very hard and he looked to see what had happened because he was startled, and then he noticed what looked like a badge, and thinking it was a police officer, and he opened up the window. (T 216) Mr. Clement confirmed the written statement of November 20, 1998 stating that, "when I saw it was a route supervisor, I unlocked the window and said, "Yes sir." Stating "Well, I may have written that, but that's not exactly what the

circumstance was because it took me a few seconds before I recognized, you know, who the person was standing there. I first thought they were a police officer.” He was then asked whether he made another statement of February 20, 1998 and what he said was, “As I was sitting at the light, I noticed a person standing in the middle of the street about 30 to 40 feet behind my bus,” then “suddenly someone hit my window hard three times. I had not noticed anyone approaching my bus, (and) it scared me. When I saw it was a route supervisor, I unlocked my window and said, yes sir.” (T 218)

Mr. Clement recalled that the first thing he said was something to the effect that he was taking him off the bus. In the statement of February 20, 1998, he said “I thought the supervisor said, ‘Don’t do that again. I’m taking you off the bus.’” (T 219) Mr. Clement responded, “Don’t do what.” He said “drive away when I want to talk to you.” (T 219) Mr. Clement then said, “Well, I didn’t know you wanted to talk to me.” (T 220) Then he turned off his bus because he said he was taking him off the bus. Mr. Bowers asked him, “What are you doing?” and Mr. Clement said, “you’re taking me off the bus.” (T 220) Mr. Bowers said, “I would take you off the bus.” Mr. Clement said to Mr. Bowers, “Don’t threaten me,” and “closed the window. (T 220-221) Mr. Bowers did, in fact, take him off the bus and did not mention the four-way flashers, and he was given a three-day disciplinary suspension by Mr. Mullihan on November 23, 1998. (T 221) (RX D)

[In evaluating the two incidents of the November 20, 1998 matter, it is also my opinion that Mr. Clement, if he did not hear or understand what Mr. Bowers was stating to him, he had an obligation to tell him that he didn’t hear him and to find out what was going on. There is no evidence that any such effort was made. The differing accounts cast a shadow on his credibility.]

The February 4, 1999 incident:

Mr. Clement testified that a day or two before the February 4th incident on his regular run, he was on Route 27 and proceeding on Hampton to College Street. He was on his last run that he was making to Oklahoma Avenue and 27th Street. Because it is U.S. 41, all three lanes of traffic including the curb lane are open for vehicles to travel on and there is no parking there. As he always does, he was using his flashers each time he would come to a stop in the lane of traffic. (T 145) Mr. Clement received a call from the dispatcher approaching Howard Avenue and asked what the problem was with the bus, and Mr. Clement told him that he did not have a problem. The dispatcher said “Well, you’ve got your flashers on. You’re driving with your flashers on.” Mr. Clement stated that he wasn’t driving with them on constantly, and that he was only using them when it was necessary for making stops. He was informed that he had been observed by management personnel driving with them on and he told him he was only “using them according to the requirements of 392.22, each time that he makes a stop in a lane of traffic, using them to warn other motorists that he is making a stop, and that his vehicle posed a hazard to them.” (T 145) He continued to Wal-Mart which is the end of the line, pulled the bus in; went into the building, looked at the board, and nothing was said to him. He had his regular piece of work for the next several months before that when he checked the extra board. (T 147) [At

this point, Mr. Clement gave an explanation of work that belongs to an operator, which cannot be taken away, and which I did not fully understand. (T 147) I conclude that the work is the employee's work unless it is taken away or reassigned by management which is what happened in this case. It is not, and could not be, a vested right.]

On February 4th at 1:27 p.m., Mr. Clement was at the station and was told that his work was taken care of. (T 148) He heard someone say it, but does not know whether it was Mike Mullihan or someone else. (T 148) Mr. Clement testified that he was told that he was going to be in a meeting, not working, and that his work was gone. (T 148) Mr. Clement testified that he was "upset by what was going on," and he then stated: "Well, if I don't have any work, I guess I'll go home." (T 148) He then testified that he "walked across the room, picked up . . . [his] . . . stuff and I walked out." (T 148-149) His response to a question from the undersigned regarding the first time that he was told that he was to have a meeting until the point that he left, Mr. Clement testified that he, "never heard anybody say anything to," him. Mr. Clement testified that he got out to the parking lot, got into his van, was very upset and decided he was going to go over to the Union Hall, to fill out a grievance at the hall because it gets processed quicker, there. He drove to the hall and started filling out the grievance when Union Agent Ric Bassler walked in and asked why he was at the hall and wasn't at the station. Mr. Clement testified that his "work had been taken away . . .," that he was a regular operator and now all of a sudden his work was gone; that he was going to be in a meeting, and that there was "no Union representation there." (T 149) Mr. Bassler responded that "Well, I was supposed to be there, but I was late." (T 149) To this, Mr. Clement responded "Well, no one said that you were late, they just said they were waiting for or on you." (T 149) Mr. Clement stated he didn't know what they meant by that and no one explained it. (T 149-150)

Mr. Clement then reviewed his position on Respondent taking his work from him, and with regard to the meeting, there was no representation there, and the company knows from a long history that he does not attend union meetings or meetings with management unless the Union representation was there. (T 150)

On questioning from the undersigned about the initial meeting with Mr. McGinty, Mr. Clement testified that he had talked to Mullihan and, in Mr. Mullihan's exact words, he said "Pat, we're having the meeting," after he was told by Station Clerk, Chuck Ciardo, to "Go see the boss. Go see McGinty." (T 151) Mr. Clement testified that when he saw Mr. Mullihan he also stated "either we're waiting for or we're waiting on Bassler." (T 152) He was then asked by the undersigned "But you left," to which he responded "Well, I told them that I had work to perform because I didn't know if he was aware of the fact that I had to do Route 27." (T 152) Mr. Clement stated that he then heard someone but didn't know who say "your work was taken care of." (T 153) Mr. Clement then confirmed that he said back to him (Mullihan?): "If I have no work, then I'll go home," then he walked back across the room. (T 153)

He was asked by the undersigned the following question: "Tell me why you didn't wait there to see if Bassler was going to show up?" Mr. Clement responded "Well, number one, if you are hanging around, and they try to engage you in talk and I didn't want to say anything or do anything until I had seen a Union rep." (T 153) I then stated "Well, basically you never did stay there long enough to know if there was going to be a meeting without a Union rep." (T 153) To this, Mr. Clement responded: "Well, I got upset." (T 153) I then stated "Right, you left before you knew that, didn't you?" Mr. Clement responded "Well, I didn't know if he was actually on the way or not, because I've been lied to before." The undersigned stated "But you didn't wait to find out. You left." Mr. Clement stated "Right." (T 154) In the discussion with Mr. Bassler at the Union Hall when Mr. Clement brought up the subject that his work being gone, Mr. Bassler said "No. No. That's not the way it is, Pat." "Someone else is starting your run and once the meeting is over, then you're going to be taken out to the bus." Mr. Clement responded "Well, that's not what I was told. That's totally different than what I was told." (T 154)

At that point, Mr. Bassler called Joe McGinty with Mr. Clement listening to Bassler's end of the conversation, and periodically telling him what Mr. McGinty was saying. (T 154-155)

At any rate, as a result of the conversation, out of which it emerged that his work was still "in tact" and that he "wasn't gone," and they still "had work for him . . . we will be going out on the bus as soon as they were done with the meeting," Mr. Bassler said "Let's go back and have the meeting," (T 155-156) In short, Mr. Clement testified that Mr. Bassler said to him, and he relied upon it: "As soon as the meeting is over, you are going out on the bus so let's go back and have the meeting. They are waiting for us."

Upon return to the station in separate vehicles, they went to Mr. McGinty's office. Those present were Joe McGinty, Ric Bassler, Mike Mullihan and Mr. Clement in the office. (T 156) Mr. McGinty began by asking why he had left, and Mr. Clement told him that he had left, that he had got upset, and there was no union representation and that he was not going to attend a meeting without union representation. He testified that Mr. McGinty stated he had called to me to stop, and that he (Mr. Clement) had ignored him and that was insubordination. Mr. Clement testified that he told him that he hadn't heard him, and that whenever he walked off, he "didn't hear anybody calling" his name or saying anything to him. (T 156-157) Mr. Clement testified that Mr. McGinty said to him "You heard me. I know you heard me." Mr. Clement testified that he said, "Joe, I never heard you." Mr. Clement testified that Ric Bassler then asked Mr. McGinty, "Well, what was Pat's response?" Mr. Clement testified that Mr. McGinty stated "he (Clement) made no response." Mr. Clement testified that he said in response to that: "And that indicates that I heard you?" and Mr. McGinty stated in response "Yes, you heard me," and that Mr. McGinty was insistent that Mr. Clement heard him. Mr. Clement testified again that "I had not heard him," and went on to state: "but he didn't listen to anything that I said." (T 157)

At that point in the conversation, Mr. Bassler stated that it was his (Mr. Bassler's) own fault that he was late and McGinty should not be upset by that; that they were there now and having the meeting to discuss what they wanted to discuss with Mr. Clement. (T 157) At this point, Mr. McGinty turned the meeting over to Mr. Mullihan who told Mr. Clement that this was a very serious matter, and that they had to have a meeting with him before he went out on the bus today, because of the serious nature of what they had to discuss with him. Mr. Mullihan stated that this was to discuss, "a final written warning for my use of flashers while driving bus." He asked about the incident a day or two earlier when he was on Route 27 and the confrontation with Mr. Bowers. (T 157) Mr. Mullihan related the call to the dispatcher to discuss a "serious rule violation" that these stops with the flashers could not be tolerated any more, and that Mr. Clement was jeopardizing safety, and other things. Mr. Mullihan stated his behavior was constituting a hazard. (T 158) Mr. Mullihan then started asking Mr. Clement if he was going to agree to stop driving with his flashers on, and Mr. Clement responded that he doesn't drive with them on, he just uses them whenever he is required to by law according to Section 392.22 and repeating his position on this under the FMCRS. Mr. Mullihan said "Pat, this has nothing to do with that, you are breaking the company rule, these rules have to be obeyed, you can't pick and choose which rules you want to obey." Mr. Clement testified that he told Mr. Mullihan "Mike, I'm supposed to obey all laws. And this is the law. I can't understand why you people don't understand the need for it. It's there to protect us and our passengers and motorists." (T 158) Mike responded "Well, that's got nothing to do with this. You're violating a company rule." (T 158) Mr. Clement told him, "Mike, we've got a disagreement about this. There's supposed to be no discipline cited for him obeying the rules." (T 158-159)

Mr. Clement went on to state they have been citing him for various things, and on the flashers, which is wrong, and that he had OSHA settlement agreements that he said they couldn't cite me or wouldn't retaliate against me for obeying the laws. (T 159) Mr. Clement alleged they were violating these agreements and that was wrong, and so on. This involved a lengthy conversation on the rules, fact that this was a final written warning and those rules. (T 160)

With regard to the February 4th meeting itself, the subject matter moved to the fact that he had left the premises earlier, Mr. Clement testified that Mr. Mullihan was talking and stated "Now, Pat this is very important. I hope you can understand the seriousness of this. We have to know for certain that you are not going to use your flashers when you go out there and drive again. Do you understand?" (T 160) Mr. Clement responded, "No, I don't understand, Mike." He stated "Well, you can't use your flashers. You have to drive like we want you to drive. You don't use your flashers when your driving. You only use them when you've got a problem on the bus. They're only for when we've got a fight or a fare dispute. . . . You don't use them when your making stops." (T 160) Mr. Clement stated, "Mike, I don't understand that, because that's not what the law says." Mr. McGinty stated, "No. This is a company rule." Mr. Clement denied in a question from the undersigned that it was never stated to him that they would not take further action on him for not attending the meeting, that Mike said "Pat, I have to know, do you agree not to use your flashers?" (T 161) Mr. Clement responded, "Mike, I can't do that [again]." Mr. Clement stated that he repeated this three times and the last time he stated "Pat, do

you understand you can't use your flashers?" and he said "Mike, I understand" Mr. McGinty cut him off and said, "Fine, that's it. Because of your actions, you're hereby terminated." (T 161) **[I have concluded from listening to all of the testimony that this is not the exact sequence of the conversation. On his return to the KK station on February 4th; Mr. Mullihan first handled the matter on the four way flashers. Mr. McGinty then dealt with leaving the premises earlier that day, later in the meeting as a separate matter, ending with the insubordination discharge.]**

Mr. Clement testified that, in Mr. McGinty's discharge he and Bassler were shocked, stating that Mr. Bassler stated, "What the hell?" and jumped up. (T 161) Mr. Clement testified that Mr. Bassler stated, "What are you talking about?" (T 162) and Mr. Clement stated, "What are you – what do you mean I am terminated?" and Mr. McGinty replied, "You disobeyed a direct order. You ignored a direct order." (T 162) At this point, Mr. Clement testified that he stated, "What are you talking about?" and Mr. McGinty responded, "You know exactly what I am talking about. You left before. You left and you disobeyed a direct order to attend the meeting," and both Bassler and I said, "We're at the meeting, Joe. We're at the meeting." (T 162) He said, "No, that's not what I'm talking about, the earlier meeting that you didn't attend." (T 162) Mr. Clement said, "I wasn't going to attend a meeting without a Union representation. You know that I don't go to meetings without a Union rep here." Mr. McGinty again stated, "You disobeyed a direct order. You walked out of the station. You didn't listen to me. You didn't follow my instructions." (T 162)

Mr. Clement testified that he stated back, "I didn't hear anybody instructing me to do anything. What are you talking about?" And repeated what was stated above about being told to stop, leaving, and not hearing him say that. Mr. McGinty claimed that he walked all the way outside and Mr. Clement said to him, "I never heard anybody say anything to me." Mr. Clement testified that he told Mr. McGinty that he did not hear him, and Mr. McGinty responded that he had to have heard him, and Mr. Clement denied that again. (T 163)

Mr. Clement confirmed that the conversation swung from the flashers back to the prior meeting, and not having gone to it. (T 163) In terms of the end of the meeting, Mr. Clement testified that he was told that he was terminated because this was the fourth incident in so many months. It was followed by four or five minutes of arguing. (T 164) After the termination for insubordination, Mr. Clement filed a grievance and went through the grievance procedure which were denied at the third step by company representative Ken Warren. (T 164) He went to the Union for consideration and was first denied by the Union's Executive Board and then by the membership. (T 165-166)

[It is my opinion that the grievance procedures involving the February 4 incident to termination and the flashers, in so far as that was involved, were considered by the union and rejected for arbitration. This marked the exhaustion of the grievance procedures. It is also my opinion that it marked the end of consideration for the November 20, 1998 incident since testimony will show this procedure was wrapped into the February 4 procedure for a resolution

if the matter went to arbitration. I consider both the procedures under the collective bargain agreement to have been exhausted on both matters.]

Mr. Clement summarized his views on what had happened by stating that he felt that by the statements that had been made to him by Lloyd Perkins of the Union and by Mike Mullihan of the company, that there was an agreement in place concerning the use of the flashers, and not being disciplined for it, and he was never told the agreement was no longer in place. He states that this placed him in jeopardy, since the company was well aware of the fact that by not informing him of that situation, that it was no longer in effect, placed him at risk of discipline that he did not know about. (T 166-167) He maintains that he was told that there was an agreement reached in 1997, he believed he would not be cited for the company until they could prove that the laws didn't exist or didn't apply to them, and that they remain there until the incidents that were described in February, 1999, even though Mr. Clement thought they were still in effect. (T 167) When they started writing him up for the flashers incidents, again he could not understand how they could be doing it, and actually the agreement with the end and the flashers to other FMCSR's. At least, Mr. Clement felt that it extended to all of the FMCSR's including driving over the ten hour rule, not having eight hours statutory risk, not working more than 60 hours in a week, and so not using the buses whenever the lights did not work properly. (T 168) Mr. Clement did confirm that he never saw a document with regard to the four-way flashers or the use of the FMCSR's. (T 169)

In his testimony, Mr. Clement cited one other incident where he had a meeting scheduled and the Union representative, Bob Gleesing did not show up. Mr. Clement waited approximately ten minutes for which Mike Mullihan called him to find out where he was. (T 176) **[It was not stated what the outcome of that matter was. This does not affect the outcome of the present matter.]**

Mr. Clement testified that once he was cited for the November 18, 1998 incident, he felt that everything he did was under "surveillance," (T 177) and it seemed like every time he did something it seemed like a supervisor was around the corner, to come and talk to him about it. He felt "like he was being followed and observed for any infraction as soon as they saw something." (T 177) Mr. Clement also testified that what he called the "Sixth Street Viaduct" incident, attributed to his problems where he voiced opinions loudly about driving a 19 ton bus across a bridge with a legal limit of 12 ton operation. (T 178) Mr. Clement put up a posting which contested the crossing of the bridge and signed it along with eight or ten other drivers. He noted that the bridge was deteriorating and that driving MCTS buses across it was both illegal and unsafe because of that condition. (T 179) After posting it, he wrote to city engineers (George Roemer) and then to the city engineer (Mario Schifalacqua). He wrote to the State Department of Transportation. He also attended public meetings. (T 180) At some point, he was talked to by Mike Mullihan about the bridge and Mr. Clement states that he stated to him, "Well, you have to drive across that bridge." (T 181) Sometime in 1998, he stated that Mr. Mullihan told him that he had noticed the petition and that he stated: "we have permission to drive across the bridge, and you have to drive across that." (T 181) Mr. Clement told him that he didn't want to be driving across it and when Mr. Mullihan stated that he was driving across it now, Mr. Clement

responded, “No, I’m not,” “I’m detouring around it.” He repeated his position on it and he continued to drive around it. Mr. Mullihan said he would have to check on that and a few weeks later, there were signs posted that said “Authorized buses only.” (T 182) Mr. Clement “kept going around it.” (T 182) Nothing happened as a result of that. (T 182) **[I find that he was not disciplined or discharged for this matter and that it has no effect on the outcome of this decision and order.]**

At the end of Mr. Clement’s case in chief, I allowed him to testify about additional evidence on documents that were not admitted, and considered Claimant’s Exhibit 12, the Sixth Street Viaduct issue. I admitted the document as general background on involvement with safety matters that are brought to the attention of management, rather than as a direct item under the federal act. (T 191)

Claimant’s Exhibit 30, a letter of May 19, 1999, from Ms. Quindel to Mr. Perkins, President of Local 998, was admitted into evidence over the objection of being a privileged document in that it was supplied to Mr. Clement, and constituted a waiver of the attorney/client privilege. (T 192) This letter contains a copy FMCSR Section 392.22 as an attachment.

[It is my opinion that this letter from Barbara Zach Quindel to Mr. Perkins contains legitimate issues raised about whether the matter should be arbitrated. It involves the well known principle that the employee must work and grieve the matter rather than refuse to work unless there is a work situation that presents a clear and present danger by, what have become, stringent objective tests. She does not, however, discuss safety issues and the distinction between those that involve clear and present dangers and those which do not. It is my opinion that no clear and present danger was involved within the meaning of its refusal to work situations in this case, and that Mr. Clement was obliged to seek and obtain a determination about his interpretation of the rules before he could refuse to honor the company rules on use of the flashers.

See Whirlpool Corp. v. Marshall, 445 U.S. 1, 100 S. Ct. 883, 886 (1980) in which the United States Supreme Court held an OSHA regulation that provided that the condition in that the employer refused to expose himself, “must be of such a nature that a reasonable person, under the circumstances then confronted the employee, would conclude that there is a real danger of death, or serious injury, and that there is insufficient time due to the urgency of the situation, to eliminate the danger through resort to regular statutory enforcement channels.” The Court cautioned that “any employee who acts in reliance on the regulation, runs the risk of discharge or reprimand in the event the Court subsequently finds that he acted unreasonably or in bad faith.” 100 S. Ct. Id. at 895. The latter point verifies the “obey (work) and grieve” rule, which states that an employee must obey the order, and the policy, and otherwise challenge the employer’s interpretation of the rule and may only refuse to work

in situation of a real danger of death or serious injury that he or she is unable to eliminate. See discussion at pages 716-718, How Arbitration Works, supra. Section 405 of the STA is consistent with these opinions.]⁸

Mr. Clement then testified with regard to Claimant's Exhibit 49A, (a letter or memorandum dated February 12, 1999 by Brethel S. Yale, M.D.) and 49B (a report by Donald Mayer, D.O. dated March 30, 1999.) (T 194) Mr. Clement verified his examination by Dr. Yale in which he had his hearing tested by audiogram, in which he states that they discussed his hearing loss and whether or not he was in need of a hearing aid to compensate for the loss. Dr. Yale stated, "I do not recommend hearing aid evaluation at this time. We have discussed this in detail. I recommend a repeat audio in a couple of years, sooner if he has any worsening problems." He was also referred to his personal doctor, Donald Mayer. With regard to the second document (CX 49B), Dr. Mayer reviewed the report from Dr. Yale, and stated that he felt that the hearing loss probably was a factor in Mr. Clement's not being able to hear people speaking to him, and that he felt that there was evidence that this is partially responsible for the situation of losing my job at Milwaukee Transport Services. (T 196) Mr. Clement stated that he discussed ringing that he had in his ears (tinnitus) and that would take an audiogram to pinpoint the exact degree of loss. (T 196) Dr. Mayer based his opinion on the history provided by Claimant, and the consultation with Dr. Yale. (T 197) Respondent objected to the receipt of the letter from Dr. Mayer as not being based on any examination of Mr. Clement's hearing, since Dr. Yale is the specialist; and secondly, Dr. Mayer himself was not a specialist in the ear, nose, and throat. (T 197) He also did not offer any opinion in CX 49B to a reasonable degree of medical certainty, and stated that the report was contrary to that of Dr. Yale, who did have a specialty. (T 197)

It was ruling of the undersigned that the report was not entitled too much weight, but it was receivable and was not challenged on the basis of authenticity. (T 197-198) Basically, in his deposition, Dr. Yale testified that Mr. Clement's speech discrimination in his right ear was 100 percent and his speech discrimination in the left ear was 96 percent, both of which would be given a designation of excellent. (Yale Depo. P. 25) He testified that Mr. Clement "should be able to hear – assuming there is not a lot of background noise – the normal spoken voice and understand it." Id. at 26. He confirmed that if others with average hearing at the same or further distance from the speaker were able to hear what the speaker was saying, based upon his audiogram evaluation of Mr. Clement, he should have been able to hear. Id. at 26-27.

On cross-examination, Mr. Clement recognized Respondent's Exhibit B as the so-called "red book" of rules and regulations of MTS, that he was given at the time he was trained, and confirmed that they were expected to abide by those rules and regulations. (T 200) In fact, each time management did apply them when he was disciplined, they cited as authority Rule 14 or 17.

⁸Documents referred to as Claimants Exhibit Nos. 1-5, 7-10, 12-29, 31, 33-47 and 49A & B were received into evidence. (T 194-195)

On February 4, Mr. Clement had been assigned a split shift from 5:46 a.m. to 9:04 a.m. and 1:27 p.m. to 6:12 p.m. (T 201) He had finished the first part of his assignment on that day, gone home and returned at 1:27 p.m. to complete his second run. (T 202) Normally, it was the clerk Chuck Ciardo, who told him to see the boss, Joe McGinty, the station manager, as he came in at 1:27 p.m. (T 202) Mike Mullihan, is his immediate supervisor, and his "station supervisor." (T 203) Ciardo did not tell him the purpose of the meeting. Mr. Clement put his seat cushion and bag down on the table, and walked to Joe McGinty's office, but encountered Mr. Mullihan on the way. He came walking out as he came out through the door, the door was open to his office. He told Mr. Clement "we have a meeting." He first denied being told that the Union had been called and Mr. Bassler was on his way. (T 204) However, he confirmed that in his deposition at p. 174, he recalled that in his unemployment compensation hearing on April 22 and June 8, 1999, at p. 174 of the transcript, he was asked, "Instead, you turned around and walked out?" And answered,

Well, I came to work to go to work.

Q. You turned around and walked out after you were told that you had a meeting, that the Union had been called, that Mr. Bassler was on his way and that your work was taken care of.

A. No, this isn't the first time – this isn't the first time I've been lied to.

Q. You walked out after you were told you were expected to be at a meeting, the Union had been called, Mr. Bassler was on the way and your work had been taken care of.

A. That's what I was told that the Union had been called. I had no proof of it.

Q. You gave that testimony, didn't you?

A. Well, that wasn't my direct testimony, that was in response to . . .

* * *

Witness: Yes, I don't recall saying that, but I see that it is written in here. (T 204-206)

Mr. Clement also confirmed that when he was told he had a meeting, McGinty or at least someone without recognizing McGinty's voice, said his work was taken care of, and he told Mr. McGinty: "Well, if I don't have any work to do, then I guess I'm going home." (T 206) At that point, he turned around and walked out, (T 206), but he denied hearing Mr. McGinty telling him three times, as he was walking out, "Pat, don't leave. If you do, that's insubordination." (T 207) Mr. Clement confirmed that after he walked out, he went to his van, which was parked across the street, and he sat there for awhile because he was pretty upset and he had to cool down. (T 207) He decided to go to the Union Hall and file a grievance, and did so. (T 207) Claimant's Exhibit 8 is the grievance form that he filled out dated 2/4/99. (T 208)

Mr. Clement stated on the grievance form: "I went to walk over to his office door and Mike Mullihan intercepted me and said they were waiting on Ric Bassler." (T 209) This was followed by "I told Mike I had to get to work (pull out at 1:39 p.m.)." (T 210) He also confirmed that Mr. McGinty

said his work had been taken care of. (T 210) He also confirmed that the reason he was filing a grievance was that his work had been illegally taken from him and that had nothing to do with four-way flashers. (T 210)

While he was in the Union office filling out the grievance forms Mr. Bassler came back, ultimately went back to the station to meet with Mr. Mullihan, Mr. McGinty and Mr. Bassler, where Mr. Mullihan gave him the final written warning about the improper use of four-way flashers. It looked like it had been prepared prior to the meeting. (T 211) Mr. Mullihan informed him that he was giving him a final written warning on the improper use of four-way flashers. (T 212) (This sequence was initially denied by Mr. Clement (T 212), but he confirmed that after Mr. Mullihan dealt with the final written warning on the four-way flashers, Mr. McGinty told him that he had been discharged for insubordination for walking out of the meeting, and refusing to attend the meeting. (T212)) Mr. McGinty was insistent that Mr. Clement had heard him say three times not to leave or it would be insubordination. (T 212)

Mr. Clement confirmed that he filed a grievance and it was denied by the company, and the Union did not take that grievance to arbitration. (T 222) He confirmed that he contends that he wasn't really fired for insubordination, but he was fired in retaliation for making safety complaints about not just the four-way flashers, but the Federal Motor Carrier Safety Regulations, in general. (T 222)

He also filed a sworn statement with the Equal Employment Opportunity Commission, under oath stating that "the real reason that he had been fired was because of the disability," which he corrected to mean that he felt that the incident where he didn't hear Mr. McGinty was a contributing factor his discharge. (T 222-224) (RX W) As a correction that this is November 20, not February 20, as mistakenly stated by counsel. (T 224) Referencing Exhibit 39 regarding Mr. Clement's hearing, 49A, was the report from Dr. Yale. An audiogram was conducted by Dr. Yale's technician. (T 226) As stated in his interview, he was told that his hearing loss was "mild to moderate." However, Exhibit 49A states that, "The hearing loss is mild in the mid-frequencies and drops off a bit in the high frequencies." (T 226-227) The report also says that he has "excellent discrimination." It said that he didn't think he needed to be evaluated for a hearing aid. (T 227) Dr. Mayer had referred him to Dr. Yale. When asked by the undersigned if he understood what the term, "excellent discrimination" meant? Mr. Clement testified that he explained it to him that he could hear words and determine what they were (T 228). However, he also told him that he was in a room where there were other conversations going on, that he wouldn't be able to distinguish between the conversations. It stated that he told them "its going to become muddled whenever your listening," and he told him that when he "hears a word, he will hear it, but with background noise or other interference, it hampers his ability to hear." (T 228) In response to these questions of the undersigned, Respondent's counsel pointed to the deposition of Dr. Yale.

As stated concerning the stop by Supervisor Bowers, Mr. Clement's accounts of the November 20, 1999 event, were decidedly inconsistent, and cast a shadow over all of his testimony, in particular the events of February 4, 1999. In the latter, he heard the direction for a meeting, and still left. He knew that a union representative was on his way. I find that his failure to perceive that he was being pursued when he was leaving, and to find out why, even if he did not hear all of it, at the most was not credible, and at the least was sufficiently disrespectful and defiant enough to warrant a conclusion by a superior that he was being insubordinate.

Ramon Rivera:

Mr. Clement's co-worker, Ramon Rivera, testified that he had been employed at MTS as a bus operator for about four years, and previously had worked as a bus driver for the Chicago Transit Authority (CTA).

He testified that in December of 1999, the new (1 year) operators, gathered at approximately 9:00 a.m. for what was called a "vacation pick," which determines what weeks they would take their vacation at the entry level operator. (T 77-78) First, they have to compile a certain number of working hours to get a week or two weeks vacation, and he felt that, according to seniority he would have one week vacation. (T 79) The person handling the list was Kristin Gerak, who initially told him that he had a vacation coming. She then changed her mind and told him that he did not. (T 79-80) This was at the Kinnickinnic Station, and was in the driver's room (T 81-82) next to supervisor Eric Hermann's office. (T 82) Mr. Rivera was in the upper ten seniority but there were certain people ahead of him picking vacation. (T 83) As he awaited his turn, he went to sign the sheet that was given to operators about to pick, and he actually grabbed a pen to sign the sheet, when Ms. Gerak said "no I told you that you don't have a vacation." (T 84) As this time, he "got upset . . . very upset." (T 84) He testified that there was a chair next to him that "flew by the wayside" [indicating that he had kicked it?] and then he kicked a garbage can as he proceeded to walk out. (T 84) He took his coat and made a commotion such that as he went out through the front door he kicked it shut and station supervisor Hermann followed him out telling him to calm down and stating that he wanted to talk to him. Mr. Rivera felt there was no point to that; that he could not have a good conversation with him, and he declined to go into Mr. Hermann's office. (T 86) Mr. Rivera told Mr. Hermann that he was going home that he needed to cool down and that is what he did, climbing to go to his office. (T 86-87)

On cross-examination, Mr. Clement confirmed that Kristin Gerak was not his supervisor (T 99), that Mr. Hermann observed him when he got angry and upset with her for giving inconsistent information and leaving the station; (T 100) and that Mr. Hermann didn't say anything when Mr. Rivera told him that he was just going to go home and to calm down. (T 101) Mr. Rivera verified that if someone was calling his name after that, and telling him to stop that he did not hear it (T 102), and Mr. Clement claimed that this was the same position he was in. (T 103)

At the end of Mr. Rivera's testimony, Mr. Clement also questioned him about the use of four-way flashers at MTS. Mr. Rivera testified that in his training classes, MTS wanted to use them to alert the police for disabled buses and to get attention of perhaps the route supervisor. (T 88) Mr. Rivera used them approximately five times (T 91) a lot of times he would have trouble on the bus and he attempted to comply with the company's position. (T 91-92). Other than this, I find that Mr. Rivera's testimony did not add much to the position of Mr. Clement on the matter.

With regard to the testimony of Ramon Rivera about the vacation pick, Mr. Hermann did not hear the entire incident, but did hear a commotion. It got louder between Mr. Rivera and Ms. Gerak, who was seated at a table. As he approached, Mr. Rivera was moving toward the door, and followed him out. He called to him and asked what was bothering him, and was told that he had bid down to part time and was given only week of vacation, and when he was full time he had at least two weeks, and he had accumulated as full time. (T 372-373) Mr. Mullihan told him he knew there was a provision in the contract that covers entry levels going to full time, where they wouldn't lose any accrued vacation, so he said he would look into the matter to see whether that would hold true so he could get his two weeks. He did not direct him to return to the office with him and stated that Mr. Rivera did not act in a insubordinate or disrespectful manner toward him on that occasion. (T 373) On cross examination, he did not know much about what had happened but he knew that there was a problem, and that he was only allowed to pick one week when he thought he should have had two. (T 376) He looked and sounded upset. He was jestering, his arms were going up in the air, he was pacing back and forth, and he was animated. (T 377) As he followed him out the door, he did not recall him kicking the garbage can. (T 377) He trailed behind him, about 30 feet away, to find out what was going on, he had already kicked the outside door before closing it. (T 380) Then, he denied knowing that he kicked a garbage can or do anything other that was visible, except when he was loud. He didnt recall exactly what Mr. Rivera said to him, he did know it involved a week's vacation. (T 383)

I find that although Mr. Rivera was a credible witness, his testimony did not affect or alter my evaluation about Mr. Clement's conduct, and leaving the premises when he was told to attend a meeting and left. The circumstances were isolated, different, less serious, and Mr. Rivera was not given any direct order that he disobeyed.

Testimony of Ric Bassler:

Mr. Bassler stated that his current job was vice-president of ATU Local 998 and that he was elected to that position. (T 461) He also held other positions with the union such as an entry level stewart at the Fond du Lac station of MTS. He also held other positions there for some 14-15 years. (T 462)

Mr. Bassler did recall statements in the union newspaper etc. to members not to attend meetings with management unless accompanied by union representation. (T 463) After establishing that Mr. Bassler still has reinstatement rights with the employer, he denied that he had any reason to see that Mr. Clement did not win this case, and be fully reinstated. (T 468-469)

Mr. Bassler testified that on February 4, 1999, he was initially called by Mr. Perkins, President of the Local (T 478), who asked him to attend the meeting with him, Mr. Clement. The call came before noon. He was told that Mr. Clement would be in station before he came there, so there was no need to call Mr. Clement. (T 479) Mr. Bassler thought he was on the bus, but didn't know, and did not contemplate calling him. (T 479)

He arrived at 1:29 or 1:30 p.m. at the station. He was aware that Mr. Clement had been cited for violation of company rules or the use of hazard warning flashers with his bus. (T 479) Pat was not aware of an agreement between the company and himself, but he would not attend the meetings unless represented by either an union steward or other representative. (T 480) He was not told the reason that he had to be at the station. (T 480)

When he arrived at about 1:30 p.m., Mr. Clement was not there. He did not see him until he went back to the union office and where he was filling out a grievance. (T 481) Mr. Bassler testified that Mr. Clement was upset because he was "denied union representation." He stated that his work had been taken away. When asked whether Mr. Bassler had stated that his work was not taken away, that he would be going out on the bus that afternoon, Mr. Bassler responded, "No, you stated that." (T 482) When asked why he called KK station to talk to Joe McGinty, Mr. Bassler responded that it was to let him know that Mr. Clement was there in the union hall. (T 482) When asked if there was some other reason, Mr. Bassler responded that he had gone to see Mr. McGinty after he was not there, earlier on his arrival at the station, and asked why he wanted to see Mr. Clement. Mr. McGinty said it had to do with the four-way flashers, so when Mr. Bassler called in from the union office, he told him that Mr. Clement was there, and wanted to resume the meeting. (T 482-483) At this point in time, Mr. Bassler was not aware that Mr. Clement had been discharged. The first time he found out that he had been discharged was when he returned to KK station, and was at the end of the meeting. (T 483-484) In response to questions from the undersigned, when he found out about the discharge at the end of the meeting, that was the first that he knew that the subject of discharge was on the table. The only subject to discipline had to do with the four-way flashers. (T 484) Mr. McGinty agreed to hold the meeting. (T 484) Referring back to the telephone conversation with McGinty at the union hall, Mr. Clement asked whether Mr. Bassler had told him that his work was still in tact, and that as soon as the meeting was finished, he would be going out to the bus, to which Mr. Bassler responded: "Pertaining to the four-way flasher, yes." (T 485) However, he testified that there was no mention about work for that day. (T 485) Clarifying, Mr. Clement asked:

Q. So you turned and told me my work was intact, that I'd be going out on the bus, but you were not told that by Mr. McGinty?

A. That's correct.

Q. Was that your assumption?

A. Yes.

(T 485-486)

When Mr. Bassler was at the station at around 1:30 p.m., nothing had been said about the work, but there was something said about discipline. He was not told anything about the work. The reason he thought his work was still in tact, "it was not uncommon for management to pull people off their route and discuss things with them," and for them to resume their route at that time. (T 486) He then stated that no one had ever told him that about Clement. (T 486) Mr. Bassler testified that the reason he said what he did was because when he talked to Mr. McGinty at 1:30 p.m., it was brought up about the discipline agreed to by the company if they would give him a final warning on discipline. He felt that he was correct in an assumption that it would be 99.9 percent chance that he would be returning to work. (T 486-487) At the point where he talked with Mr. McGinty, Mr. Clement had not been terminated or suspended. (T 487)

Mr. Bassler testified that when Mr. McGinty stated that Mr. Clement was fired, his reaction was that he was, "surprised, wanted to know why." By Mr. Clement's reaction, he was also surprised, and he was upset throughout the entire meeting (T 488) Mr. McGinty announced that Mr. Clement was terminated at the end of the meeting on the four-way flashers. (T 488) Mr. Mullihan was discussing the flashers and the final written warning. He had asked questions about whether Mr. Clement had been driving with his flashers on and discussed the particulars about that. Mr. Clement denied that he was "driving with them on, . . ." that he was using them each time he came to a stop in a lane of traffic. (T 489) Mr. Bassler confirmed that Mr. Clement was maintaining this in accordance with federal law, citing the sections as discussed above, and objected to a final written warning as a violation of federal law. (T 489)

Mr. Bassler also recalled when referring the OSHA settlements, being a violation of those settlements. The meeting was less than an hour, perhaps 40 minutes, and Mr. Mullihan repeatedly kept asking him if he was going to stop using his flashers. (T 490) Mr. Clement brought up the laws again that Mr. Clement could not be allowed to start the afternoon piece until they had talked. (T 491)

Mr. Clement was attempting to ask Mr. Bassler questions about the time that he was paid for and not paid for, and finally made a statement to the effect that he was pointing out that he had not been paid for his time at the meeting on February 4. (T 496) **[I noted that, informing him that specifically if he won his case, he would pick up his time; if he lost it, he wouldn't. I did not want to foreclose any entitlements that he had as a matter of contract. Mr. Bassler did confirm Mr. Clement was paid for the actual time spent in the meeting with Mr. Mullihan and**

**Mr. McGinty, although Mr. Clement apparently believed he was entitled to pay for the afternoon, and may have been.
(T 496-497)]**

On cross examination (T 497), Respondent's counsel repeated the details of the meeting, and confirmed that Mr. McGinty and Mr. Mullihan explained to him that they wanted to discuss with him the four-way flashers and, the fact, that he had left the station. (T 498) Compared to Mr. Bassler, they had merely told Mr. Clement when he was at the station that Mr. Bassler was on his way down, and that Mr. Clement had left. (T 498) Mr. Bassler does not think that they told Mr. Clement that if he left, it would be insubordination. (T 499) He did tell him that they had called him a couple of times and Mr. Clement continued to walk. On questions by the undersigned, on what Mr. McGinty and Mr. Mullihan said he saw them at 1:30 p.m., Mr. Bassler stated that they were "frustrated" and not understanding why Mr. Clement had left. (T 499) He confirmed that they were in the driver's area, they had called for Mr. Clement to come back, and he kept walking. He repeated this a couple of times. (T 499) As he talked about the reason why they were calling him again, it was the four-way flashers. (T 500)

When he asked about anything else that was said about the meeting, Mr. Bassler stated that with regard to his return, "we basically worked out an agreement that they wanted to give him what's called a final warning on the four-way flashers, because I was very concerned as a union rep what the discipline would be." (T 500) Mr. McGinty told them that was the purpose of the original meeting on February 4th, and that's why he was there to represent Mr. Clement, because they were going to give him the four way flasher final warning. (T 500) When asked why he suspected that there might be other discipline, Mr. Bassler stated: "because of Mr. Clement continuing to walk when they told him to stop." (T 501) Mr. McGinty did not tell Mr. Bassler that he would not issue any other discipline if he came back with Mr. Clement. (T 503) When the four way flasher part of the meeting ended, Mr. Mullihan told them he would put everything in writing and give it to Mr. Clement. (T 504) At that point, Mr. McGinty began discussing Mr. Clement having walked out. (Mr. Mullihan did not say that he was going to type up a termination notice.) (T 504-505)

Again repeating what Mr. Clement was told in the meeting, Mr. Bassler said that he was told that they felt it was insubordination because they had told him that Mr. Bassler was on his way there, and he still walked out; but they had called him a few times when he was walking and they went behind him and asked him to come back, and he just kept walking, and they felt this was insubordination. (T 505) When asked why he walked out, Mr. Clement stated that he did not believe them that Mr. Bassler was on his way. (T 505) Mr. Bassler also stated that he did not hear them saying he should stop or he would be in subordination, he stated that in the meeting. (T 506) Clarifying again, in response to a question as whether Mr. Clement did admit that he had heard Mr. Mullihan and Mr. McGinty telling him he was to attend the meeting, and Mr. Bassler had been called and was on his way, Mr. Bassler responded that that was said (T 506), and then Mr. Clement walked out after being told that he had to attend the meeting, he was on the way.

Mr. Bassler also confirmed that in the meeting Mr. McGinty did refer the fact that this was Mr. Clement's second occurrence of insubordination within a few months, there was no reference of a four way flashers in this discharge action. When asked what the reason was that Mr. Bassler believed that Mr. Clement had been discharged, Mr. Bassler responded, "for insubordination." (T 507) In reviewing the minutes of the meeting (RX O), the second step, at no time did Mr. Clement claim that either Mr. Mullihan or Mr. McGinty indicated that the continued use of the four way flashers was the reason he was being discharged. (T 508) The third step of the grievance was also upheld by Mr. Warren, and the basis was, again, that he had been insubordinate walking out of the KK station on February 4th. (T 509; RX P)

With regard to the beginning of the second portion of the meeting with Mr. McGinty, Mr. Bassler confirmed that he stated, "Joe, that's not part of this, or we didn't discuss that" (T 511), and was upset at bringing it up. Mr. Bassler did respond to the questions on the matter that Mr. Clement had responded that he did not hear him when he told him several times not to leave. (T 513) Mr. Bassler also confirmed that when he replied Mr. Clement had made no response to the statements of walking out of the station, and showed no response or indication that he had heard them. (T 513) He also confirmed that when Mr. Clement asked Mr. McGinty why he thought he heard him, and made no response, Mr. McGinty stated that he believed that Mr. Clement "felt that he chose not to answer him," and that he had heard Mr. McGinty. (T 514)

With regard to the meetings at the union hall, Mr. Bassler did recall Mr. Clement preparing statements about possible loss of hearing. (T 515) Mr. Bassler did confirm telling Mr. McGinty in the meeting, in discussing Mr. Clement's leaving the station, that if he said he didn't hear him, then he didn't hear him. (T 517) Mr. McGinty's response was that he did not believe it. (T 517)

Mr. Bassler was a credible, reliable witness. I credit his testimony in full.

Testimony of Joseph C. McGinty:

Mr. McGinty testified that he worked for MTS for 35 years and eight months and that he retired on April 30, 2000. (T 233) His position at the time he retired was station manager at the KK Station, which is one of three operating stations for bus drivers, where they come to report to work in the morning or afternoon, when their shift starts, pick up their buses and pull out to service the public. He had been station manager at KK for eleven years. He had held a number of different positions, including bus driver, extra clerk, route supervisor, security supervisor, relief dispatcher and relief station manager. (T 234) In 1986, he became station manager for the Febron Station and, in 1989, the KK station and stayed until retirement. Mr. McGinty's job responsibilities were to be sure that the station functioned properly, that operators were available to pull the buses out, and to monitor clerks to make sure assignments were given out to the drivers, as needed. It is not a union-represented position. (T 236) As a route supervisor, back in 1979, it was a non-represented position. Two station supervisors report to him. Mike Mullihan and Eric Hermann were the station supervisors when he retired. (T 237)

Mr. Clement was an operator at KK station and his immediate supervisor was Mr. Mullihan. Mr. McGinty was involved with the decision to discharge Mr. Clement and did so on February 4, 1999 as a Rule 14 discharge. (T 237) (Conduct, behavior, disrespect or insubordination.) (T 239; EX. B) A suspension or dismissal may be issued on the first offense, and dismissal for the second offense, and if there is a second offense within 24 months under the Rule 14, it results in dismissal. (T 240; EX. B)

Mr. McGinty testified that on February 4, 1999, Mr. Mullihan received a call some time in the morning that they were to have a meeting with Mr. Clement before he started work, to discuss the issuance of a final written warning. (T 240-241) He told both the clerks to watch for Mr. Clement when he came in, and to come directly to his office. (T 241) He also called the Union President, Mr. Perkins, stating he understood there was a meeting, and received a return call from Union Representative Mr. Gleesing. He said that Mr. Perkins would not attend but Mr. Bassler would be there to represent Mr. Clement. (T 242)

The first time Mr. McGinty saw Mr. Clement on the afternoon of February 4, 1999, was about 1:27 p.m., standing right outside his office door which leads to clerk area. (T 243) He stated that he heard the clerk tell him to come to his office. Mr. Mullihan, who was standing, by him turned around, and walked to the door and intercepted Mr. Clement, at that point, Mr. Clement walked past Mr. Mullihan and went over to Mr. McGinty's door. At this point, Mr. Mullihan said, "We have a meeting." (T 243) Mr. McGinty stated that Mr. Clement walked past, looked over where (his) door was, turned around and walked back past Mr. Mullihan, who repeated, "We have a meeting." At this point, Mr. Clement said, "No, I have work to do." Mr. McGinty then stepped out into the doorway and told Mr. Clement, "no your work has been taken care of. We have a meeting." He stated that Mr. Clement responded, saying: "Well, if I have no work, I'm going home." (T 244) He then proceeded to walk away from them towards the exit door. Mr. Mullihan stated: "Wait – come back, we have a meeting." (T 244) Mr. McGinty proceeded to go after Mr. Clement, telling him again that "we have a meeting here," and Mr. Clement just continued to walk. Mr. McGinty again stated, "Come back, we have a meeting." About that point, Mr. McGinty stated that he said: "If you don't come back, its insubordination." He stated that he said that three times. (T 244) Mr. McGinty testified that when Mr. Clement finally left the station, he followed him out the door, and said, "If you don't come back, you will be suspended to my office." (T 245) The term "suspended to my office" meant that he would not receive any work until he came in and talked to him. (T 245) Mr. McGinty testified that he was within three to four feet away when he said these things to him (T 245)

Mr. McGinty went to the front to talk to Mr. Ciardo to "inform the operator that has Mr. Clement's work that he (the other operator) would complete it." He also informed the board clerk to show Mr. Clement as suspended and report to this office. (T 245) Mr. McGinty explained that the first shift clerk had a driver available to take out Mr. Clement's work at 1:27 p.m., so Mr. McGinty had felt he would be coming back and wouldn't be finishing it, so he had to change that, because he would be finishing it. (T 245-246)

Mr. McGinty testified that about a minute or two after Mr. Clement walked out of the building, Mr. Bassler showed up. They had a short meeting just informing Mr. Bassler what had happened, and that Mr. Clement had left the office – or the building. Mr. McGinty stated that he informed Mr. Bassler that he told Mr. Clement that they were having a meeting and he was supposed to attend. He was then told that Mr. Clement said, “Well, I have no work. So I’m going home.” Mr. Bassler asked where he went and he said “as far as he knew he went home.” (T 246) Mr. McGinty testified that he heard from Mr. Bassler later on, when he called saying that he had showed up at the station. It was approximately 20 minutes later, he called and said Mr. Clement is down at the Union Hall and would like to come back and talk to him. Mr. McGinty said “Fine. I’ll be here,” and when he returned he notified Mr. Mullihan that they were there, and they were going to have a meeting. When they arrived, Mr. Bassler stated they wanted to talk about the insubordination, and Mr. McGinty stated he told them no, they would talk about the initial meeting they were supposed to have, they would conduct that, and then discuss the insubordination. (T 247)

At that point, they convened the initial meeting on the use of the flashers, stating when he would use them, not to use them except “when he is in need of police or supervisor or assistance, he’s having problems on the bus,” and gave this as a final written warning. (T 248) This, he said, was not an investigatory meeting. He could not remember if they actually gave him the slip, but they went into the second meeting on insubordination. (T 248) Mr. Bassler said he didn’t feel that Mr. Clement should be suspended for insubordination because he returned to the station. However, the final outcome was that Mr. McGinty discharged him for insubordination for failure to attend the meeting, as requested by the company. The statement says: “In view of your overall work record, including disregard for company policy, disregard for management authority and insubordination, you are hereby notified that you are discharged effective February 4, 1999.” (T 249; RX A) This explained that overall work record and disregard for company policy, referred to not coming to the meeting as required by management personnel, disregard to that reference of overall work record and disregard for company policy explained that reference to the first insubordination with the supervisor on November 20 as the first incident in which was within the 24 month period. In lieu of that being the second time, the rule called for a discharge. (T 249)

When asked on cross examination by Mr. Clement, whether the red book contains just the punishment phase and not rules, Mr. McGinty stated that “there are rules in there that the operators must follow.” (T 259) These appear, however, in the blue book which is an operator’s manual that they carry. (T 259-260; CX 6) Claimant’s Exhibit No. 6 was thought at this point to be received into evidence insofar as it contained Section 2.03 “Laws and Ordinances.” (T 263) That part states:

The operation of MCTS equipment is governed by all traffic laws and regulations of the state of Wisconsin and all municipalities in which MCTS operates. Operators are required to cooperate with law enforcement agencies and fire departments at all times.

(T 263-264) Mr. McGinty confirmed that the operator must follow those laws or otherwise he could face discipline. Section 3.16 of the rules state:

Disabled vehicles: When a defect that affects the safe operation of a vehicle is detected, the dispatcher will arrange for a bus change or other necessary corrective action as warranted. Four-way flashers are not to be used on a disabled bus except on the freeway or when police assistance is required. (Emphasis added - T 265)

This constitutes the four-way flasher policy. (T 265) Mr. McGinty confirmed that this means that there is no other use for the four-way in relationship to the bus operation. While these were last revised in 1987, and the mid-90's, the rule was in effect throughout the time period in question here, in one form or another, and at least from 1997 to the present. (T 265-266)

Mr. McGinty confirmed the sequence of calls on February 4, as stated above, but was unable to recall who it was that told him to hold the meeting. (T 267) The call was around 10:00 a.m. (T 268), after Mr. Clement had gone home following his first run. There were no calls to Mr. Clement at home following this. (T 269) Mr. McGinty confirmed that it was Mr. Clement's continuing request that a Union representative be present for meetings. (T 270) Mr. McGinty also confirmed that there were two other meetings where Mr. Clement had walked out, and he did not recall warning Mr. Clement not to walk out of those meetings (T 271), or words similar to this stated on February 4th. (T 272) Mr. McGinty confirmed that he was the person who said, in response to Mr. Clement's statement that he had worked for him, that his work was gone or taken care of. (T 274) Mr. McGinty confirmed that neither Mr. Mullihan nor he ever said anything about another driver that was going to start Mr. Clement's run, (T 275) or make the statement, "the work was being started by a different driver, but I [Mr. Clement] would be completing the work once the meeting was done." (T 276) He also confirmed that after Mr. Clement left, he told Mr. Ciardo to call the dispatcher or the replacement driver and inform him that Mr. Clement was not going to be relieved, and the replacement was going to have the whole route to finish. (T 276) Mr. McGinty confirmed that Mr. Bassler arrived in a few minutes after Mr. Clement had left, that he said that he tried to make it but he just couldn't do so. (T 278)

Mr. McGinty stated that after he and Mullihan explained what had happened in a approximately five minute conversation with Mr. Bassler, he got up and left (T 279), at approximately 1:35 p.m. (T 279-280) After the call back from Mr. Bassler from the Union Hall was received about 20 minutes later (1:50-1:55 p.m.), or 2:00 p.m., he told them that Mr. Clement was there at the Union Hall and would like to come back and discuss the matter with them, to which Mr. McGinty said, "Fine." (T 280)

Mr. McGinty did agree that it was implied by Ric Bassler that he and Mr. Clement would return to the station and that the meeting would then take place (T 281); and that he would not tell him

there was no need or that he was already fired; nor give him the detail that the work had been filled. (T 281-282)

Mr. McGinty again confirmed that the purpose of the first meeting was the final written warning notice on the flashers, and the second part was for insubordination. (T 283) At the meeting, Mr. Mullihan, Mr. Bassler, Mr. McGinty and Mr. Clement, testified that he let Mr. Mullihan give him the final warning on the flashers, there was no discussion on insubordination initially. (T 284) He confirmed that Mr. Bassler came in and wanted to discuss the insubordination but he was told no by Mr. McGinty and they would discuss the flashers first. (T 284) Mr. McGinty clarified that in the conversation with Mr. Bassler after Mr. Clement had left, Mr. McGinty informed Mr. Bassler that Mr. Clement was going to be disciplined for insubordination (T 287), but did not tell him he was going to be discharged. He also confirmed that the purpose of the original meeting was the four-way flashers, thus, in the telephone call a few minutes later, the subject of the either the insubordination or the four-way flashers did not come up. (T 288) The subject was that Mr. Bassler was returning with Mr. Clement. (T 288)

Mr. McGinty then confirmed that around 2:45 p.m. when he returned, the four of them went into the meeting and Mr. Bassler launched into the insubordination issue, or at least started to discuss it, as soon as he came into the office and sat down. (T 289) At that point, Mr. McGinty stated that he told him no, they wanted to discuss the four-way flashers first. And that is the way they proceeded. (T 289) Mr. Mullihan discussed the flashers but he did not recall asking questions about the incident of a few days earlier. Mr. McGinty verified that Mr. Mullihan merely turned to the statement that he had violated the four-way flasher rule, and that he was being given a final written warning. (T 290) He did not recall discussing the incident of a few days earlier. They didn't discuss the leaving of the meeting until Mr. Mullihan said he was finished, or something to that effect (T 291), and then Mr. McGinty took over the meeting. Mr. McGinty did confirm some questions from the undersigned though they were saying regardless of what he said about what he was going to do about the use of the flashers in the future, he was being issued the final warning. (T 292)

With regard to the insubordination, Mr. Clement pointed to the phrase in Respondent's Exhibit A, that the unacceptable conduct or work performance, stated: "In view of your overall work record." He wanted to know what that encompassed. Mr. McGinty replied that his safety accident record was "ok," it was, "fine". He stated that as far as driving the bus was concerned, or operating the bus, he was "average." There were some bus drivers that had worse safety records. (T 294) In the part of Exhibit A, that stated his "disregard" i.e., of company policy, Mr. McGinty stated that this referred to attending meetings, and disregard for management authority. (T 294) It did not include the four-way flashers. (T 294)

At this point, Mr. Clement started reviewing the statements that he had made as stated above in his testimony, regarding his positions on the four-way flasher policy and the Federal Motor Carrier Safety Regulations as incorporated by Wisconsin. (T 296-298) Mr. McGinty denied knowledge of

any verbal agreement that existed between the company and the Union regarding further discipline not being given to him for observance of FMCSR's. (T 299) At the time, Mr. Clement and he asked Mr. McGinty whether he considered MTS exempt from the regulations regarding four-way flashers, and the FMCRSC. He stated no, but they applied to MTS as a common carrier. (T 301) Mr. McGinty, in response to a question from the undersigned, stated in effect that even if he agreed to abide by the company's position on the flashers, that Mr. Clement would have been terminated for insubordination anyway. (T 307) A similar question was asked by the company's counsel and he again stated that if they decided if Mr. Clement had agreed to follow the flasher policy, he had not decided not to fire him. (T 309)

I find that Mr. McGinty was a credible, consistent witness with good demeanor, and credit this testimony in full.

The Testimony of Mr. Mullihan

Mr. Mullihan testified that he worked for Milwaukee Transport for 21 years and was presently Station Supervisor at the KK station, where he has been for approximately 6 ½ years. He started in 1980 as an operator; but was promoted to "follow-up" in 1987; and in 1990 took over as coordinator of training and safety. In about 1994, he was made station supervisor. As "follow-up", he was a "follow-up instructor." He rode buses, built rapport with the operators, and did safety checks and troubleshooting. (T 313) He was not a member of the bargaining unit in that position. His job as station supervisor had him coordinating day-to-day operations, and making sure the bus got out, keeping the door open if someone needed a question about detours or safety matters, and administered discipline, when necessary. (T 314) Mr. Mullihan was coordinator of training and safety at the Administrative Building when Mr. Clement was hired. He would meet entry level operators, discussing work rules, and giving them everything from their hat and badge to their red book. (T 314) He confirmed that the red book was given to Mr. Clement upon his hire, and discussed their use of progressive discipline.

He repeated that on November 23, 1998, Mr. Clement was issued a three-day suspension for the November 20, 1999 incident. (T 315; RX D) This was for insubordination and violation of Rule 14, stating that Patrick Clement was found to be disrespectful and insubordinate to a route supervisor, Andy Bowers. (T 316) The discipline stated that Mr. Bowers had been driving on Capitol Drive, and happened to see a bus "out of the bus layover with its four ways on." (Where the driver can stop for a minimum of three minutes to adjust his schedule.) Mr. Clement was found not to be at the bus stop but south of the bus stop by some distance, and therefore, "out-of-layover" with his four way flashers on. (T 317)

Since the route supervisor always interprets the four way lights, unless there is an emergency or accident, as needing assistance, he pulled over, stopped in front of the bus, southbound on the other side of the street, as it was a vehicle and was approaching Mr. Clement's bus. He claimed that when he was close to the bus he made eye contact with Mr. Clement as he approached it. (T 317) At that point, Mr. Clement started the engine and drove away, and Mr. Bowers was left in the middle of the street. Mr. Bowers followed north to a stop light on foot, running and caught up with the bus. He had to knock on the side of the bus at the window to speak to Mr. Clement. Mr. Bowers was upset about having his safety having been compromised by being left in the middle of the road, so he said, "Don't do that again, or I'll take you off the bus," to which Mr. Clement responded "Don't threaten me," and as he did that or after that, he, according to Mr. Bowers, slammed the window on Mr. Bowers' face. Mr. Bowers went around to the front of the bus, boarded the bus and told Mr. Clement he was being taken off the bus. (T 317-318)

When Mr. Mullihan talked to Mr. Bowers, and he told him what had happened, Mr. Clement was immediately placed on suspension but he could not talk to him until he came back to work, sometime after November 23, [probably in between.] (T 319)

Mr. Mullihan stated that on February 4, at approximately 10:00 a.m., Mike Weber, director of operators and secretary for MTS, instructed him to give Mr. Clement a final written warning on use of the four way flashers. (T 321) Mr. Mullihan then called Union Stewart, Bob Gleesing, to arrange the meeting and left a message for him, in response to which the local president, Lloyd Perkins talked to Mr. McGinty. (T 321-322) He also posted Mr. Clement's badge number as done to inform a person that they should talk to their supervisor. (T 323)

Mr. Mullihan was there when they were talking to Mr. McGinty, when Mr. Clement arrived, and Mr. Mullihan repeated the contact with the union and statements between Mr. McGinty and Mr. Clement, the fact that Mr. Bassler was on his way. Mr. Clement's response to being told that they had a meeting, was that he had work to perform. Mr. Mullihan told Mr. Clement that it had been taken care of. (T 325) He repeated this and Mr. Clement stated that he was going home, and Mr. McGinty made three attempts to get him to "stop, or it would be insubordination." He verified that he was no more than 15 feet from them when the exchanges took place (T 325), and noted the quieting of the rest of the people in the room when the exchange between Clement and McGinty took place. (T 326) This all took place over a period of only a couple of minutes, and Mr. Bassler arrived shortly after Mr. Clement left. (T 327) He then explained what had happened with Mr. Bassler, who then left for the Union office. (T 327) Mr. Mullihan did not hear the telephone conversation between Mr. Bassler and Mr. McGinty that followed, but he did learn that Bassler and Clement were returning.

They did so at 2:00 p.m. and met in Mr. McGinty's office. (T 328) Mr. McGinty had told Mr. Bassler that Mr. Mullihan would start the meeting and he did so with regard to the final warning for improper use of flashers; stated Mr. Clement's use of them would not be tolerated in the company and was subject to progressive discipline, which would apply to any future violations of the work rule, and

they expected him to follow the company's policy on four way flashers. (T 328-329) He recalled Mr. Clement saying, "Do you want me to disobey the law?" and Mr. Mullihan told him that he wasn't there to interpret laws or create company policy, he was there to enforce policy, and that he (Mr. Clement) would obey their policy. (T329) At this point, he repeated that policy. Mr. Mullihan stated that they were in full compliance with all state and federal laws, in response to a question from the undersigned, and stated that, "that question was not asked and answered at the meeting." (T 329-330) At that point, he testified that he physically issued Mr. Clement the final written warning, and Mr. McGinty took over the meeting. (T 330)

With regard to the insubordination, Mr. McGinty informed Mr. Bassler and Mr. Clement that they were going to discuss the chain of events that occurred earlier in the station, and Mr. Clement explained that nobody told him he was being paid for the meeting, and that he was going home. Mr. Bassler was just listening. (T 330) After this, he stated, hearing nothing from Mr. Clement that would change the chain of events, Mr. McGinty discharged Mr. Clement under the second violation of insubordination. (T 331) He stated that he was unaware of any agreement between the company and Mr. Clement, that they would not discipline him for use of a four way flashers in violation of company policy. (T 331)

On cross examination, Mr. Mullihan confirmed that on November 23, 1998, Mr. Clement had received two 3-day suspensions; one issue with Mr. Bowers' on the 20th and the second is the disciplinary action, together for a total of six days. (T 332)

In cross examination, Mr. Clement asked a number of questions about books that have been maintained, to which I overruled objections as a proper course of cross examination in relation notes requested in the discovery phrase. (T 338-343) Mr. Mullihan testified that he had no other documentation, notes, etc. between Clement and members of management, that meetings are not to take place without union representation present. (T 364) Mr. Mullihan stated that he turned over anything he had a long time ago to the attorneys or the company on the matter. (T 365) **[During the pre-hearing conferences, Mr. Clement had objected to not receiving all notes from management personnel, and maintained at the outset of the hearing that they still had not been received. I find that all of the requested items that MTS officials had in their possession, that were requested, were turned over to Mr. Clement.]**

In discussing several prior incidents, Mr. Mullihan could not recall specific dates but did recall certain ones about improper use of four way flashers, and being cited for them, one of which was by supervisor Graymont. (T 348) He also recalled the report of the November 20th incident where supervisor Bowers approached the bus (T 350), and they went to investigate because he saw the four way flashers turned on, which were flashing while the bus was out of the bus layover, and more than a bus length south of the bus stop. (T 350)

With regard to Mr. Vebber's directions to Mr. Mullihan on February 4, he directed him to write out on a record of disciplinary action, a final written warning on the improper use of four way flashers, which is what he did. (T 353) By questions and answers, Mr. Clement and Mr. Mullihan repeated the process that was followed to get him to the meeting, including the contacts with the union, and to Mr. McGinty the fact that Mr. Clement was not directly called after the contact. (T 354) Mr. Clement would always have union representation (T 355), denying that any agreement had been reached not to discipline him for violations of FMCSR's. (T 356) Mr. Mullihan denied that there had been any such agreement.

In response to several questions on various miscellaneous matters, it was Mr. McGinty who informed Mr. Mullihan that Mr. Bassler was coming to the original February 4th meeting, after talking to union president, Perkins. He admitted that none of them had talked directly to Bassler. (T 358)

On February 4, Mr. Mullihan considered the noise in the area to be normal (T 358), but the TV was probably on, if there were drivers in the room. (T 359-360)

Mr. Mullihan also confirmed that he was instructed to tell Mr. Clement that this company, MTS, always complies with state and federal laws that applied to MTS. (T 362) On redirect, Mr. Mullihan stated that he had never suspended or terminated an employee for not attending a meeting when Union representation was not present or available. (T 364)

I find that Mr. Mullihan was also a consistent, credible witness with good demeanor. I credit his testimony.

Testimony of Eric Hermann:

Station supervisor, Eric Hermann, of the Fond du Lac Station, stated that he had been in that position since 1994, and started out as a bus operator in July, 1976. He was a station supervisor at KK Station from January of 1998 until May, 2000. (T 368-369) He was present on February 4 at the KK Station, the date Mr. Clement was terminated. He prepared a written document on February 8 on what he had witnessed that day by typing it into the computer, himself. (T 369, RX J)

Mr. Hermann testified that about 1:30, Mr. Mullihan, Mr. McGinty and he were all going to exit the clerk's area through the clerk's door. The other two exited as he reached the door, and he saw Mr. Clement walking toward Mr. McGinty and Mr. Mullihan, so he stepped back to allow them to pass. Mr. Mullihan stopped Mr. Clement and said, "You have a meeting;" and Mr. Clement stated that he had to do his work; that Mr. Mullihan stated that he had somebody that would do his work for him, and that Mr. Clement then said, "Well, then I'm going home." He started to walk toward the door past Mr. Mullihan. (T 370) Mr. McGinty followed him and as stated above, repeated the need for the meeting, and at least two statements and that if he left it would be insubordination. They were still

talking in the parking lot. Mr. Hermann was no more than 15 feet from when he heard the statements made. (T 371)

With regard to the February 4 incident, with Mr. Clement, he knew what the normal noise level was, and that this was normal but not excessively so. He could not recall whether the TV was on or off, even though in most days it was on. (T 383) He estimated seven to ten other drivers were present. (T 385) He admitted that he certainly wouldn't try to carry on a conversation across the room under those conditions. (T 386)

I credit Mr. Hermann's testimony.

Testimony of Lloyd Grant:

MTS director of labor relations and affirmative action, Lloyd Grant testified that he had been in the position for six years, and that he had held a number of other positions such as an administrative assistant, manager of engineering, manager of safety, and manager of labor relations. (T 387) His primary duties involve oversight of our labor contract with two collective bargaining units, ATU Local 998 and OPEIU Local 35. In addition, he represents management in grievance procedures at the third step, in the case of discharges where they are in the second step. (T 387-388) He also represents them in arbitration cases, and affirmative action duties of oversight for claims of discrimination which may be received. (T 388) He has the authority at the second step of the grievance procedure to overrule the discharge. (T 388)

Mr. Grant prepared the minutes of the second step grievance meeting concerning the February 4, 1999 incident with Mr. Clement (T 389; RX O). **Mr. Clement first maintained at the meeting that his work was taken from him, that it was given to someone else, and that he interpreted that as being no longer on the clock, and on his own time, with no obligation to meet with management. Secondly, he told them that no one had told him that he would be paid for attending the meeting, so he was on his own time, and had no obligation to meet with them; and thirdly, management did not have a right under the terms of the labor agreement to schedule a meeting with him at all regarding performance issues.** (T 390-391) According to the labor management, the labor agreement between MTS and ATU Local 998 (RX C), in effect from 1996 through 2001, stated there was a provision Section 13.06(2) which requires employees who are required to attend meetings to be paid. (T 392) He felt that the appropriate provision was where it states that any time it is necessary for management to meet with employees, they will be paid for time spent in a minimum of ten minutes. It has been practice to exercise the right to direct the workforce, and if it's necessary to schedule a meeting with an employee, they do so without imposing unreasonable demands on employee's time. (T 392) Mr. Clement was not off the clock when he met with them on February 4. (T 392) It is not a practice to tell employees that they will be paid. (T 392-393)

Mr. Clement testified that he stated he had been very sorry for what had happened in his statement regarding the February 4 incident. (T 394; RX) Mr. Grant issued a decision on Mr. Clement's events relating to his discharge (T 394; RX P), in which he determined that the discharge for insubordination was proper and denied the grievance. (T 394) Mr. Clement engaged in insubordination when he refused to attend the meeting as directed by Mr. McGinty and Mr. Mullihan, considering the fact that he had been warned the consequences of refusing to attend the meeting, and that it could result in discipline, given the previously warning that insubordination would mean discharge, if the determination was that the decision was fair. (T 395) He based the decision on the fact that Mr. Clement admitted having heard and acknowledged the clerk, that he first told him to see Mr. McGinty and; that, Mr. Mullihan had talked to him informing him that there was a meeting. (T 395-396)

Mr. Grant testified that he had reviewed a list of ten employees of the union felt had also engaged in acts of insubordination but given lesser discipline than Mr. Clement. (T 396; RX P) He reviewed them and found nothing in any of the employee's files that was similar to the incident following Mr. Clement. (T 397) None involved a second offense of insubordination. (T 397) Not all of them were disciplined for insubordination and only two of the ten were actually bus operators subject to the rules under the red book for bus operators. (T 397) Minutes of the third step meeting dated March 3, 1999, related to the February 4 discharge. (RX Q) and the second document, a fax from Mr. Clement to Mr. Warren dated March 4, 1999 in response to the minutes that had been prepared). (T 398) Mr. Warren is Mr. Grant's immediate supervisor and vice-president and deputy director of the company. Mr. Warren concluded that the discharge was for cause and Mr. Clement had, in fact, engaged in insubordinate behavior. (T 398) The Union did not take Mr. Clement's discharge to arbitration. (T 399)

Likewise, Mr. Grant testified that, at the fourth step meeting on April 27, 1999 of the November 20, 1999 incident, Mr. Clement had received a three-day suspension for insubordination and that he upheld the suspension. (T 400-401; RX F) Mr. Grant interviewed supervisor Bowers at length, and went to the location where the incident occurred at two occasions, one at mid-day and one at dusk. In the latter, he noticed that the area was more lit, with eight extremely bright street lamps in the area with one near the bus layover. (T 401) As a result, he upheld Mr. Bowers' testimony on the basis on the determination of what occurred was, in his opinion, more credible than what was relayed to him by Mr. Clement. (T 402) Again, this matter was not taken to arbitration.⁹

Mr. Grant reviewed a number of different policies with respect to four way flashers, the differences between how they are used in the maintenance department and they are used by the bus operators in the transportation department. He repeated the mandate that flashers be used as a means

⁹Mr. Grant stated that after Mr. Clement was discharged, union vice-president Perkins requested that, in the event of discharge case went to arbitration, they would agree to have it heard by one arbitrator at the same time, because the discharge involves some of the progressive discipline issues. This request was granted by Mr. Grant. (T 402)

of alerting their security force, their supervisory force, and the local police when there is an immediate problem on the bus, where they need assistance, and that is the only time that they should be using the flashers, because it would send incorrect messages to the parties. (T 403) The maintenance department may use the flashers when a truck is disabled or when an individual mechanic is attempting to service a bus on the road. (T 403) Mr. Grant testified that he received at least one complaint from the West Allis police department who had contacted the director of operations, Mr. Vebber, and informed him that a bus had been traveling through their municipality on several occasions with its flashers on; that they had taken time to intercept the bus as an emergency call to them, only to find out after boarding the bus, that there was no problem on the bus at all. They informed MTS that if it continued that way, they would discontinue responding to any buses driving through their municipality with their flashers on because it was wasting their time. (T 404) Mr. Clement did not deny this incident. Mr. Grant stated that he maintains relations with many labor relations professionals throughout the transit industry, and they contacted other parties, either by way of phone or talk with individuals at conferences, regarding applicability of these standards at their transit properties and no one could tell him that they applied, that particular rule applied at their properties at all. (T 404-405) They were familiar with the rule with the regulation but did not apply it to their transit system at all. (T 405)

Mr. Grant testified that Milwaukee County assumed ownership of MCTS on July 1, 1975, and at about that time Milwaukee County contracted with Milwaukee Transport Services, to manage the Milwaukee County Transit System and employ the operators. That relationship has continued to the present time, uninterrupted. (T 405)

At the time of the hearing, Mr. Grant testified that he was Director of Labor Relations and former manager of labor relations, which was essentially the same job with a different title, in many respects. (T 406) Mr. Grant testified that he made notes on a pad and after prepared the minutes, he did not need the written notes. (T 407) Confronted in a question from the undersigned that he prepares the minutes from notes, he stated that he takes them and then destroys the notes. (T 408) He confirmed that shortly after he typed out minutes, he destroyed the notes. (T 408) This would have taken place within a few days of the third step meeting. (T 409) Mr. Grant confirmed that this (EX. O) was not a record in the proceedings; that Mr. Clement had requested an opportunity to provide comments and response to the minutes, and that this was not unusual as a request from the union to do such things. (T 409) Mr. Grant testified that it is not customary to keep a verbatim record of the grievance procedures. (T 410) Mr. Grant confirmed that he does not know any employees who work for MCTS. (T 411)

He also confirmed that at the times that he went out to look at the place where the November 20 incident referred. It was a different time, but he noted that the time of the year would also be different. (T 411-412)

I credit Mr. Grant's testimony after having heard his testimony in full, and having observed his demeanor as a witness.

Testimony of Joseph R. Baker:

Joseph R. Baker testified that he was station manager assigned to KK station from February 1999, after having been an entry level operator from August, 1986 to 1988, and a full time operator after that. (T 421) On the afternoon of February 4, 1999, he recalled Mr. Ciardo saying that Mr. McGinty wanted to see Mr. Clement. He was seated, and there were two or three other people in a fairly big room. He didn't know what had happened after that, until he heard Mr. McGinty say something to the effect to Mr. Clement, "Don't leave this station." At this time, he looked up, and was about 15-20 feet from Mr. McGinty. Mr. Clement was between him. (12 feet) He stated that when Mr. Clement continued to walk away from Mr. McGinty, to the table (T 423-424), Mr. McGinty stated: "Don't leave the station," and Mr. McGinty picked up his things and headed for the door. As Mr. McGinty followed him, he went through the door to the outside door. Mr. McGinty went to the interior door, possibly a step through, and for the third time said to Mr. Clement: "this is the third time, if you leave the station, its insubordination." (T 424) He signed a statement to which he counts these incidents. (RX L, T. 424) Mr. Clement questioned Mr. Baker about not recalling whether the TV was on or off, with some people talking; and it being not noisy but quieter than normal; 1:30 p.m. being how the busy time of the day, and some drivers starting to come for the afternoon. He repeated Mr. Clement walking toward the door, the distances, and his reaction to the statements not to leave the station which was basically no reaction. Mr. Baker admitted not saying that Joe was talking to him and interceding at that point; not being concerned about it and if not occurring to Mr. Baker that Mr. Clement didn't hear him but stating "No, I assumed that you did hear him." (T 427-428) In terms of being certain whether he knew whether Mr. Clement heard Mr. McGinty or not, he stated "Nobody can say that." (T 428) With regard to people talking, when Mr. McGinty told Mr. Clement not to leave the station, he stated "If anybody was talking, they stopped and looked up," the first time that he made the statement.¹⁰

I find that Mr. Baker was a credible, reliable witness and credit his testimony.

Testimony of Jose B. Bermudez:

Mr. Bermudez testified that he had been employed as an operator for approximately 14 years. He was hired in 1986 and went full time in June, 1988. He had been assigned to KK for approximately the last 13 years (T 430) and had known Mr. Clement during that time. (T 430)

On the afternoon of February 4, 1999, he recalled Mr. Clement coming into the building and Mr. Ciardo telling him, "Pat, Joe wants to see you," or "Mr. McGinty wants to see you." He thought

¹⁰Note: Page 428, the statements if anybody was talking, they stopped and looked up was the answer to the question by Mr. Scullen - not part of the question. A. "And that was the first time that he made that statement? Q. Yeah, right is the answer. Transcript page 428 stands corrected.

he said “Joe.” There were approximately seven to ten people in the room. (T 430) Mr. Clement went into Mr. McGinty’s office and a minute or so later came out with Mr. McGinty right behind him. Mr. McGinty told Mr. Clement not to leave the station a couple of times. Mr. Clement stopped and picked up his stuff and headed toward the door, and Mr. McGinty told him if he did leave the building, it was “insubordination.” (T 431) Mr. McGinty did raise his voice a little bit in giving the instructions to Mr. Clement, “higher, not regular speaking voice,” – got excited himself, I guess. (T 431) When Mr. McGinty came behind Mr. Clement “. . . everything stopped. . . . and [they] started looking.” (T 431) They were both about the same distance from Mr. McGinty. (T 432) When asked whether it appeared that Mr. Clement heard him, he stated that it appeared to him that he did but that he did not know, and that he was “sure he did.” When asked why he said that, he stated: “Everybody else heard him. I heard him. Baker heard him.” (T 432) Mr. Bermudez identified a statement that was made by him which accurately reflected his testimony. (T 432; RX K)

On cross examination, Mr. Clement discussed the noise level as about average for a room that day, but stated that with regard to people coming and going, that was occurring “not yet.” (T 432) He said there were about eight people in the room with the TV on. He described where he was standing watching people playing cards, in the clerk’s area across from Mr. Ciardo. (T 433-434)

When asked whether he would carry on a conversation across the room, Mr. Bermudez testified “Well, I don’t see why not.” (T 436) When asked by Mr. Clement, even though Mr. Bermudez didn’t see a response out of him, “do you still feel that Mr. Clement heard him?”, he answered: “I’m sure you did.” (T 437) This was stated in response to the question “You don’t think that if I had heard him I wouldn’t have turned around and told him what I thought?” He answered, “No.” (T 437)

I find that Mr. Bermudez was a credible witness and credit his testimony in full.

CONCLUSIONS OF LAW

The Surface Transportation Assistance Act (“STA” or the “Act,” herein) prohibits discharging an employee because

(A) the employee ... has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety regulation, standard, or order, . . . or

(B) the employee refuses to operate a vehicle because

(i) the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety or health; or

(ii) the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's unsafe condition.

49 U.S.C. §§ 31105(a), often referred to as Section 405 of the Act.

These activities, which are referred to as “protected activities,” are the only activities for which redress is available under the Act. Different wrongful activities by an employer may be redressed under different statutes, but those statutes are not at issue in this proceeding.¹¹

Generally, in order for a claim under the Act to proceed, a complainant must first make out a *prima facie* case showing that the employer and employee are covered under the Act, that the employee engaged in a protected activity under the Act, and that the employee was terminated or otherwise discriminated against as a result of this protected activity. *Mace v. Ona Delivery Systems, Inc.*, 9 1 STA-10 @ 3 (Sec'y Jan. 27, 1992). *Byrd v. Consolidated Motor Freight*, 97-STA-9, p.p. 4-5 (ARB May 5, 1998)¹² Normally, the respondent then has the opportunity to rebut the *prima facie* case by showing it had a non-discriminatory reason for disciplining the complainant. *Green v. Creech Brothers Trucking*, 92-STA-4 @ 7 (Sec'y Dec. 9, 1992) *remanded on other grounds* (Sec'y Dec. 7, 1993). However, where the employer asserts a non-discriminatory reason for discharge during its case, the *prima facie* step can be skipped, and I may proceed directly to the next step: deciding whether the employer's reason is pretextual. *Olson v. Missoula Ready Mix*, 95-STA-21 (Sec'y Mar. 15, 1996); *Pittman v. Goggin Truck Line, Inc.*, 96-STA-25 @ n.2 (ARB Sept. 23, 1997) (citing *Carroll v. Bechtel Power Corp.*, 9 1 -ERA-46 (Sec'y Feb. 15, 1995), *affd sub nom*, *Carroll v. U. S. Dept. of Labor*, 7 8 F. 3 d 3 5 2, 3 5 6 (8th Cir. 1996)). *See also*, *Scott v. Roadway Express, Inc.*, ARB No. 99-013, ALJ No. 1998-STA-8 (ARB July 28, 1999), for a general overview of the standards and burdens for claims arising under Section 405 of the Act. In addition, in *Pike v. Public Storage Companies, Inc.*, ARB No. 99-072, ALJ No. 1998-STA-35 (ARB Aug. 10, 1999), the ARB adopted the ALJ's recommended decision, but noted in regard to the ALJ's analysis of a *prima facie* case: "In a case fully tried on the merits, ... [i]t is not particularly useful to analyze whether the complainant established a *prima facie* case. ... Rather, the relevant inquiry is whether [the complainant] established, by a preponderance of the evidence, that the reason for his discharge was his protected safety complaints." This follows the U.S. Supreme Court's decision in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 506-508 (1993).

¹¹For instance, attempts by Mr. Clement to get MTS to change its policies on use of four way flashers to include a more liberal use of them may have invoked the protective provisions of Section 8(a) (1) and (3) of the National Labor Relations Act, as amended, 29 U.S.C. §158(a)(1) and (3).

¹²Citations to administrative decisions are citations to the official copies of the decisions found in the Office of Administrative Law Judges on-line law library, which is accessible through the Internet at <http://www.oalj.dol.gov/library.htm>. Record documents that may be referenced by the undersigned, have been marked as ALJX 1-5.

Initially, I find that there is no dispute that the respondent is covered by the Act. MTS does not challenge that it is covered by the Act. *See* 49 U. S. C. § 31101. I do question, however, whether he actually engaged in a “protected activity under STAA, since he failed to establish that directing him to drive within Respondent’s delination of circumstances for use and non-use of the four way hazard warning flashers constituted an actual violation of the Federal Motor Carrier Safety Regulations.

The "refusal to drive" provision, set forth above from Section 405 of the STAA, 49 U.S.C. §§ 31105(a)(1)(B), has two subparagraphs. Subparagraph (ii) involves a refusal to drive based upon equipment defects, and does not apply. To be protected under subparagraph (i), however, the complainant must show that operating the vehicle would have caused an actual violation of a motor carrier safety regulation; it is not sufficient that the driver had a reasonable belief about a violation. Such a refusal to drive when the contemplated run would cause a violation of a Federal motor carrier safety regulation is a protected activity under STAA subsection 405(a)(1)(B)(i) if the driver informed his employer of the safety basis for the refusal. *Paquin v. J.B. Hunt Transport, Inc.*, 93-STA-44 (Sec’y July 19, 1994), slip op. at 5; *Asst Sec. and Waldrep v. Performance Transport, Inc.*, 93-STA-23 (Sec’y Apr. 6, 1994), slip op. at 8 (complainant’s remark to employer about no longer driving “illegally” sufficient to establish protected refusal to drive). However, to come within the protection of this provision, the complainant must also show that an actual violation of a regulation would have occurred; it is not sufficient that the driver had a reasonable belief about a violation. *Yellow Freight System, Inc. v. Reich*, 38 F.3d 76 (2d Cir. 1994); *Robinson v. Duff Truck Line, Inc.*, 86-STA-3 (Sec’y Mar. 6, 1987), slip op. at 12-13, *aff’d*, *Duff Truck Line, Inc. v. Brock*, 848 F.2d 189 (6th Cir. 1988)(per curiam) (unpublished decision available at 1988 U.S. App. LEXIS 9164); *Brame v. Consolidated Freightways*, 90-STA-20 (Sec’y June 17, 1992), slip op. at 3.

For reasons that are set forth herein, I find that Mr. Clement’s failure to obtain a determination from some authoritative source that the MTS interpretation of the four way flasher regulation actually violated that regulation, even though he may have had a reasonable belief that it did, was fatal to his position here, and does not warrant a refusal to drive. I reach this conclusion by analogizing to the tests set forth in subsection (b) (ii)

Mr. Clement may have engaged in other protected activity, such as when he refused to drive his bus over the weight limited Sixth Street bridge, but that fact does not affect the outcome of my decision and order on the present matter. Likewise, it is clear that he did suffer an “adverse” action from the employer in the form of a discharge for insubordination, and a final warning concerning his use of four-way flashers. The issue in this case, however, involves establishing a nexus between the adverse conduct and the alleged protected activity, the use of the four way flashers and his position on it. No action was taken against him on the Sixth Street bridge action, and I so find.

In responding, MTS has offered (articulated) a legitimate business reason for its actions. The sole obligation of MTS in response to Mr. Clement’s allegations in this matter, was to “articulate” a non-discriminatory business reason for the refusal to do so. For reasons stated herein, it need not have

“proven” that this was the reason, *Shute v. Silver Eagle Co.*, 96-STA- 19 @ 2 (ARB June 11, 1997), but it is my opinion that it has done so. It remains Mr. Clement’s burden to show that this reason was not credible or that it was pretextual, and that it was for the retaliatory purposes alleged. The question, then, involves one of motivation: were the adverse actions for his protected activity involving his use of the four way flashers? This, he must establish by a preponderance of the evidence, regardless of the shifting burden of persuasion. For the following reasons, I find that he has not done so. Conceding that there is “some evidence” that the actions taken might have appeared to have been motivated by his vigorous advocacy of his four-way-flasher position, in the final analysis, this does not withstand scrutiny because his position was in conflict with the equally legitimate position of MTS on the application of the flasher rule to city/county bus transit system. By disobeying the company’s order, in addition to being in violation of legitimate company policy, Mr. Clement was creating his own safety problems, for which MTS was justified in creating the rule in the first place, and for disciplining him for his failure to abide by it, while advocating his position on the matter in another forum. This case involves actions, not speech, and Mr. Clement has not proven by a preponderance of the evidence that the action of terminating him was motivated by the advocacy of his four way flasher position.

This matter presents a classic case of whether a particular Federal whistleblower act is violated when an employer disciplines an individual employee who takes or refuses to take an action mandated by company policy, that, contrary to the employer, the employee claims to have the right to do or not to do under a particular statute, rule or regulation, the mandate of which has been reasonably reviewed by management and has remained unsettled for years by the relevant federal and state governmental agencies. It is also a classic case of the timing of discipline for the employee’s conduct as an alleged act of insubordination, even though it occurs in relation to a scheduled meeting which involved the initial disputed issue, and the extent to which it may be separated from the advocacy of Claimant’s position and that initial disputed issue. As stated above, in the end run, the employee must establish the violation, and has not done so, here.

The regulation in dispute involves the use of four way flasher signals or hazardous warning lights, on Milwaukee Transit buses under provisions of the Federal Motor Carrier Safety Regulations, (FMCSRs) 49 C.F.R. §392.22(a), when the busses are pulling over to the curb for certain passengers, rest and scheduled stops. The regulation requires use of hazardous warning flashers (four way flashers) when a commercial vehicle is:

stopped upon the traveled portion of a highway or the shoulder of a highway for any cause other than necessary traffic stops.

Section 3.16 of the MTS Operations Manual states, with regard to Disabled Vehicles:

Four way flashers are not to be used on a disabled bus except on the freeway or

when police assistance is required.¹³

As stated above, the basic issue here is how far an employee can go in refusing to obey his employer's orders when it is not clear whether the statute the employee believes is being violated actually applies to the employer at the times in question. These are decisions that are useful in resolving this issue.

In *Minard v. Nerco Delama Co.*, 92-SWD-1 (Sec'y Jan. 25, 1994), the Secretary concluded that where the complainant has a reasonable belief that a violation has occurred, he or she is protected. However, the employee's complaints must be grounded in conditions reasonably perceived to be violations of the act. Opposition to an employer's actions which are reasonably believed to be in violation are protected, irrespective of whether or not it is ultimately determined that the employer's actions did not violate the act either because the employer did not do what was complained of or because the actions the employer took did not actually violate the act. *Id.* (Analogizing SWDA whistleblower provisions to violations of Title VII), citing *Berg v. La Crosse Cooler Co.*, 612 F.2d 1041 (7th Cir. 1980).

Internal complaints to managers are protected activity. In *Stockdill v. Catalytic Industrial Maintenance Company, Inc.*, 90-ERA-43 (Sec'y Jan. 24, 1996), the Secretary agreed with the ALJ's conclusion that the Complainant's initial concerns about wearing a dust mask lost their protection after the Respondent adequately responded to the Complainant's concerns. The ALJ found that the Respondent in fact went to significant lengths to investigate and explain the safety of the work area, and gave the Complainant opportunities to change his mind about his refusal to work. The Secretary wrote, "Had Complainant inquired further or had he more expertise or knowledge of contamination prevention or dust detection, Respondent might have been required to further explain and display the safety of Complainant's work area." This was apparently contradictory to the Secretary's determination, made in *Sutherland v. Spray Systems Environmental*, 95-CAA-1 (Sec'y Feb. 26, 1996), that management is not required to engage in a dialogue with employees who refuse to work after an adequate explanation is made.

In short, the outcome of this case will be a factual determination, and for reasons set forth herein, I find that in the present case the employer's explanation of the reasonableness of its position takes precedence in weighing the countervailing positions on the use of the four way flashers by the Complainant.

¹³Both parties have stated that the federal provisions have been adopted by the Wisconsin legislature. I have been unable to find any such reference, either cited by the parties or referenced in the current Wisconsin statutes. There is such a reference in the old Section 327, which was replaced by new Chapters 14 and 115, without that particular provision.

There is also a contravening policy involving safety matters: an employee does not have to follow an order, and to act, where the action involves a clear and present danger to himself /herself or to others. However, this involves a very high standard.¹⁴ Here, the safety contentions of the parties over the use of the four-way-flashers are in conflict, but Mr. Clement has failed to establish that failure to use the flashers in any one of the contested situations would have constituted a clear and present danger of death or injury in the non-use of such four way flashers to either himself or to others, within the meaning of such a standard. In such instances, his obligation was to follow the policy dictates of MTS, and to reserve actual usage of the flashers to circumstances that would meet the very high standard of “clear and present danger.”

The employer maintains that it is within the scope of its own legitimate exercise of managerial discretion to establish when the flashers will be utilized, within the meaning of definition, and has determined that they must be used only in true emergencies, such as dealing with unruly passengers, theft, etc. Mr. Clement presents a contrary, but otherwise legitimate interpretation of the rule or regulation, stating that the rule mandates that they must be used at all such stops where the driver is not out of traffic. The employer maintains that the rule applies to over-the-road trucking operations, and was not meant to apply to its bus operations. It maintains that it may establish rules on use of such flashers, as a matter of policy, and take disciplinary action against an employee for acting in contravention of its interpretation because the employee’s actions are having a continuous adverse effect on the employer’s overall operations. It also maintains that its rules do not violate any state or federal laws, or rules of regulations. Mr. Clement has failed to establish by a preponderance of the evidence that it does.

In such a circumstance, I find that this particular employer’s business explanation for its exercise of discretion constitutes a legitimate business explanation for its actions regarding Mr. Clement, rather than a pretext for discrimination against the employee for advocating his position on the rule, and that it supercedes the position of the employee in terms of the safety and stability of its operations. In terms of the interpretation of the rule, both interpretations of the rule, which involve conveying legitimate safety considerations, are legitimate interpretations that are for other agencies of the government to decide which of them may finally be correct. To the date of the hearing, there has been no determination that any such laws, rules or regulations have been violated. As stated at the hearing, the final interpretation of the meaning of the rule, and its application to city bus services, is not going to be made by the undersigned.

The situation basically casts the relative positions of the parties into equipoise, since both positions constitute reasonable interpretations of the regulation. This also means that the employee has not established by a preponderance of the evidence that the employer’s explanation of its position on

¹⁴See, e.g., Whirlpool Corp. v. Marshall, 445 U.S. 1, 2, 100 S.Ct. 883, 866 (1950) (reasonable apprehension of death or serious injury coupled with a reasonable belief that no less drastic alternative is available.)

the rule, and enforcing it by disciplining him for acting contrary to the rule, was for the purpose of retaliating against him for arguing his position. Once having established the policy, however, in the absence of a resolution of the conflicting interpretations by any other designated authority, the employer had the right, and indeed the obligation, to enforce its rules on the actual use of the four way flashers on the bus routes in a comprehensible and reliable fashion, so that passengers, police and the public at large could depend upon the meaning of the use of the flashers.

This disposes of the final warning issued to Mr. Clement on the application of the rule.

The insubordination issue, however, must be viewed on its own, even though occurring in the context of the final warning with regard to the four way flasher issue. While a temporal linkage has been established, any presumption or inference created by that timing is subject to rebuttal by the employer.

Respondent's brief examines this issue and cites to three 7th circuit cases which answer this question in the negative, with which I agree. In Kahn v. U.S. Dept. of Labor, 64 F.3d 271, 278 (7th Cir. 1995), the court held that "an employee's insubordination toward supervisors and coworkers, even when engaged in a protected activity, is justification for termination." Additionally, Kahn cited both Sullair P.T.O. Inc. v. NLRB, 641 F.2d 500, 502-504 (7th Cir. 1981) wherein it was held that "shouting vulgarities towards management warrants discharge", and NLRB v. Truck Drivers, Oil Carriers, Etc., 630 F.2d 505, 508-509 (7th Cir. 1980) wherein the court held that "distributing a letter to the employer's executive board during a political luncheon to the potential embarrassment of the employer justifies termination." Even if a finding is made that complainant was engaged in protected activity, this does not give him free rein to act in a manner that would otherwise be deemed insubordinate and subject to termination.

While I find that the matter of Union Representative Bassler's successful effort in reestablishing the meeting between Mr. Clement and MTS management to have been legitimately unsettling to him, in that he then found himself "surprised," and perhaps "blind-sided" by the termination for insubordination, Mr. Clement was solely the victim of his own actions. I find that his prior conduct of walking out of the building before he had established whether he would be paid for the meeting time, and not waiting for a few minutes to see if the union representative was going to arrive, constituted unwarranted and insubordinate action. Management was in charge of the work schedule, and there was no indication that Mr. Clement would not be paid for the meeting time when his bus driving scheduled work was "taken away" from him to accommodate the meeting. (His protest that no one told him that he would be paid for the time of the meeting did not relieve him of the obligation to have asked about that matter if it was troubling him. There is absolutely no evidence that he would not have been paid for the time in the meeting, since he had been told to be there, and the collective bargaining agreement provides for such paid time.) Whether he heard all of the commands not to leave or the action would be an act of insubordination is not the issue. The issue was whether he had an obligation to attend a meeting that he was informed that he had to attend. He acknowledges that he was told of the meeting and that a union representative, Mr. Bassler, would be there. He chose not to attend it, for

reasons that I do not credit as a legitimate explanation for so doing, and was, therefore, insubordinate.

I do credit management officials, however, in their statements that Mr. Clement was told three times not to leave or that it would be considered an act of insubordination. I find that the evidence that Mr. Clement offered to the effect that he had a significant hearing loss so as to not hear the statements being made on the matter within 10 to 15 feet of him, was not persuasive that he had such a preclusive loss. I find that the statements not to leave were made, and that his failure to respond either to the statements themselves, or to the obvious actions of Mr. Mullihan to get him to stay, all defiantly taking place in the presence of other drivers reinforce my conclusion that the action of not attending the meeting and leaving the premises was a deliberate and insubordinate action. At the very least, the Respondent's statement of its belief that Mr. Clement had heard the three time admonition not to leave or to then be subject to a charge of insubordination was a reasonable belief, and constituted a legitimate business explanation for the discharge.

In terms of the business explanation being offered by the employer, Mr. Clement already had one current suspension for insubordination of the November, 2000 insubordinate act on his record - albeit, that it also involved a potential dispute on his use of the four way flashers on a route. The matter was subject to the grievance procedures of the collective bargaining agreement, which I find to have been exhausted, and the discipline was not reversed.

It is an axiom of both arbitration law and labor law that an employee has an obligation to "obey now and grieve later."¹⁵ That means that the employee has the obligation to follow the orders of the employer, and to then grieve the matter, if the employee feels that the order violates some law, regulation, standard or order or the provisions of a collective bargaining agreement, and provided that the employee is not under a reasonable apprehension of death or serious injury coupled with a reasonable belief that no less drastic alternative is available under Supreme Court's ruling in Whirlpool, supra. These are the elements of a violation under Section 405 of the STA, A & B, 49 U.S.C. § 31105. Here, Mr. Clement was letting everyone know about his position on the four way flashers, but he never got a definitive ruling from any authority that his interpretation was correct, or that the employer's was incorrect. The employer had the discretionary right, as discussed above, to use its managerial powers, and to make a policy decision on the matter, that drivers had to follow, and to call a meeting to tell him so. It had an independent right to call the meeting itself, regardless of its purpose, and to mandate his presence.

CONCLUSION

Mr. Clement has failed to establish by a preponderance of the evidence that either the final warning on the use of the flashers, or his termination for insubordination, was for reasons protected by

¹⁵*See discussion in Elkouri and Elkouri, How Arbitration Works, 4th Ed., BNA Books, Washington, D.C. (1985) p.p. 719-720.

the Surface Transportation Act. I also find that Mr. Clement's return to the meeting to complete the

four way flasher element did not constitute a waiver of the employer's right to discipline Mr. Clement for his insubordinate conduct of leaving the original meeting in the first place. Therefore,

IT IS ORDERED that the complaint of Patrick Clement alleging violations of the Surface Transportation Act be dismissed.

A
THOMAS F. PHALEN, JR
Administrative Law Judge

NOTICE

The Recommended Decision and Order and the administrative file in this matter will be forwarded for review by the Administrative Review Board, U.S. Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, N.W., Washington, D.C. 20210. See 29 C.F.R. § 1978.109(a); and 61 Fed. Reg. 19978 (1996).